STATE OF MICHIGAN
SUPREME COURT

Appeal from the Michigan Court of Appeals
O'Connell, P.J., White And Cooper, J.J.

CITY OF GROSSE POINTE PARK, MICHIGAN,
Plaintiff-Appellee,

v.

MICHIGAN MUNICIPAL LIABILITY AND PROPERTY POOL,
Defendant-Appellant.

Supreme Court
No. 125630

Court of Appeals
No. 228347

Oakland County
Circuit Court
No. 98-806998-CK

MICHIGAN MUNICIPAL LIABILITY AND PROPERTY POOL'S BRIEF ON APPEAL

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STATEMENT OF THE BASIS OF JURISDICTION

The jurisdiction of this Court is predicated on Const 1963, art 6, §4 and MCR 7.301(A)(2).

The Michigan Municipal Liability and Property Pool (Pool) filed a timely appeal and the City of Grosse Pointe Park (Park) filed a timely cross-appeal from the trial court's judgment granting portions and denying portions of each party's cross motion for summary disposition. (Final Order and Judgment, 6/15/00, Apx 24a)

The Court of Appeals' majority, in part, remanded to the trial court with instructions on certain issues and decided other issues as a matter of law, including that extrinsic evidence may be used to create ambiguity in a contract and the Pool may, on remand, be estopped from asserting that exclusion. (Opinion, 10/30/03, Apx 28a and 43a) The Pool's timely request for reconsideration was denied. (Order, 1/7/04, Apx 45a)

Cross applications for leave to appeal were filed. This Court granted the Pool's application for leave to appeal limited to three issues:

(1) whether sewage is a 'pollutant' under the applicable insurance policy's pollution exclusion clause;

(2) whether extrinsic evidence may be used to establish an ambiguity in the pollution exclusion clause; and,

(3) whether the defendant may be estopped from asserting the pollution exclusion.

This Court denied the Park's cross-application for leave to appeal because it was not persuaded the questions presented should be reviewed by the Court. (Order, 11/5/04, Apx 46a)

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER SEWAGE IS A POLLUTANT UNDER THE POLLUTION EXCLUSION CLAUSE?

The Michigan Municipal Liability and Property Pool answers "yes."

Grosse Pointe Park answers "no."

The trial court answered "yes."

The Court of Appeals majority did not answer. The dissent answered "yes."

II. WHETHER EXTRINSIC EVIDENCE MAY BE USED TO ESTABLISH AN AMBIGUITY IN THE POLLUTION EXCLUSION CLAUSE?

The Michigan Municipal Liability and Property Pool answers "no."

Grosse Pointe Park answers "yes."

The trial court did not address this issue.

The Court of Appeals majority answered "yes." The dissent answered "no."

III. WHETHER DEFENDANT MAY BE ESTOPPED FROM ASSERTING THE POLLUTION EXCLUSION?

The Michigan Municipal Liability and Property Pool answers "no."

Grosse Pointe Park answers "yes."

The trial court answered "yes."

The Court of Appeals majority did not answer. The dissent answered "no."

STATEMENT OF FACTS

A. INTRODUCTION

This is an action for declaratory judgment in which the City of Grosse Pointe Park (Park) seeks a declaration of rights under an insurance policy between the Park and its municipal insurance carrier, the Michigan Municipal Liability and Property Pool (Pool). The dispute between the parties began with underlying litigation in which 300 class action-plaintiffs filed suit against the Park as the result of the Park's long-term discharge of sewage into a neighborhood creek, known as "Fox Creek." The plaintiffs in that litigation lived along and near Fox Creek in the City of Detroit. They complained that the Park's discharge of sewage into Fox Creek polluted the creek and damaged them in other ways.

The underlying lawsuit, Etheridge, et al. v City of Grosse Pointe Park, et al. ("Etheridge")[1] was filed in 1995. Upon receipt of the complaint, the Park submitted it to the Pool for defense and indemnity coverage. The Pool provided the Park with a defense under a timely reservation of rights letter. The case was settled prior to trial when the Park and the City of Detroit paid $3.8M in damages and agreed to terminate the discharge of sewage into Fox Creek. (Etheridge Complaint, 9/14/95, Apx 342a; Reservation of Rights letter, 10/6/95, Apx 447a)

Having reserved its rights, the Pool denied indemnification coverage and the Park filed this suit seeking a declaration that the Pool must reimburse to the Park its portion of the settlement ($1.9M) under the parties' insurance coverage document. (Complaint, Grosse Pointe Park v Michigan Municipal Liability & Property Pool, 3/5/987, Apx 47a)

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[1] The City of Detroit was subsequently named as a defendant also.

B. THE PARK'S COMBINED SEWER SYSTEM

The Park has a "combined" sewer system. In a combined system, sewage (from toilets, for example) and storm water run-off (rain water) enter and are transported to a treatment plant by a single sewer line. The alternative is a "separated" system, with separate sewer pipes running throughout a municipality, one for sewage and one for rainwater. Combined systems, such as the Park's, are often overtaxed by heavy rainfall. With significant rain in a short period of time the single sewer pipe servicing a community fills up and is incapable of transporting all combined sewage to a treatment plant. The excess, without a relief valve, backs up into the homes and businesses connected to the system.[2]

The Park's relief valve was Fox Creek. This narrow tributary, 35 feet wide and 7 feet deep, is located in the City of Detroit. It runs south, from Jefferson Avenue to the Detroit River, approximately 6,900 feet, parallel to the boundary between Detroit and the Park. Near the creek's Detroit River end, there are a series of connecting canals. The area is a densely populated residential neighborhood with private homes lining the Detroit side of Fox Creek. Homes, businesses, a mobile home park, and a public park sit along the banks of the connecting canals. The creek and canals are used recreationally, serving privately owned boat wells and small craft docking facilities. (Report – Fox Creek Drainage, Detroit Water Supply and Related Problems, 1/24/48, Apx 1239a, p 6-2, Apx 1286a, Figure 21, Apx 1382a, and Figure 24, Apx 1393a; Report on Sewerage System Operation, 4/1/60, Apx 1395a, p 4, Apx 1400a; Flood Control Study, Fox Creek and Connecting Canals, 7/28/86, Apx 674a, Figure 5, Apx 689a)

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[2] During the course of the Etheridge suit, the Park constructed a "separated" sewer system, thus terminating all Fox Creek discharges. This discussion addresses the combined sewer system in existence from 1940 to 1995, prior to the Etheridge suit, unless otherwise noted.

In 1938, the Park entered into a contract with the City of Detroit under which the Park purchased the right to pump combined sewage into an interceptor sewer for transport to the Detroit sewage treatment plant. This contract permitted the Park to pump a maximum of 84 cubic feet per second (cfs) to the Detroit treatment plant and to construct a pump station and discharge pipe for the purpose of discharging the Park's excess combined sewage directly into Fox Creek. This contract, which remained in effect for over 55 years, permitted the Park to discharge into Fox Creek during "storm water periods when the storm flow from the Park is in excess of 84 c.f.s." (Park's Common Statement of Facts, Apx 61a, pp 7-8, Apx 69a – 700a; 1938 Contract, Apx 572a)[3]

Construction of the Park's pump station and 12 foot diameter discharge pipe was completed in 1940. The pump station has nine pumps; five smaller pumps to pump sewage to the Detroit sewage treatment plant and four larger pumps to discharge sewage into Fox Creek. These Fox Creek discharge pumps were manually engaged by pump station operators according to a written protocol posted on the wall of the pump station. In the event of heavy rain, the maximum storage capacity within the Park's single sewer line was to be exhausted before discharges to Fox Creek. If the

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[3] Until the late 1800's, human waste in urban centers was dumped into privy vaults and cesspools. With population density and the development of water utilities to deliver increased amounts of water to residences and buildings by pipe, these systems became progressively less effective and municipalities began installing public sewer systems to address health and aesthetic concerns. At the same time, suburban areas primarily employed septic tanks for human waste disposal. As suburban areas grew and water delivery systems expanded, suburban sewer systems were developed and connected to nearby central systems in larger cities. In the northeast and through the Greater Lakes' basin, most of these urban and suburban sewers were "combined" sewers. (The Park's experience, including construction of a combined sewer system connected to a regional treatment system centered in Detroit, mirrors this history.) See generally Melosi, Martin V. The Sanitary City: Urban Infrastructure in America From Colonial Times to the Present, John Hopkins University Press, 2000, cited by the U.S. Environmental Protection Agency in its Report to Congress on Implementation and Enforcement of the Combined Sewer Overflow Control Policy, December 2001, Chapter 2, p 2-2, Apx 1028a and page 2-3 of this report as to the concentration of combined systems in the northeast and Great Lakes area. (Apx 1029a)

discharge pumps were not timely activated, however, the system's single sewer line filled and backed up into homes and businesses through basement floor drains connected to the system. (Park's Common Statement of Facts, pp 7-8, Apx 699a – 700a; Park's Trial Court Brief on Coverages A & D, Apx 146a, pp 10-12, Apx 158a – 160a; Pump Station Protocol, Apx 1638a; Combined Sewer Overflow Study, Apx 1436a, pp 2, 7 & 11, Apx 1439a, 1444a and 1448a)

C. THE NATURE OF THE DISCHARGES

1. THE NUMBER, FREQUENCY, AND AMOUNT OF THE DISCHARGES

The discharge of combined sewage into Fox Creek occurred several hundred times from 1940 to 1995. The precise number is unknown. The only available records reflecting days and gallons pumped cover the period 1955 to 1995. In that 40-year period, the Park pumped at least 2.65 billion gallons of combined sewage into Fox Creek on more than 300 different days. From 1955 to 1959 the pumps were activated 150 different days; in the 1960's, 69 days; in the 1970's, 34 days; in the 1980's, 43 days; and from 1990 to 1995, the Park discharged combined sewage into Fox Creek 20 times, exceeding its 25 year average of 3.6 times per year from 1971 to 1995. The total combined sewage pumped into Fox Creek from 1990 to 1995 alone was 165.7 million gallons. (Park's Common Statement of Facts, pp 7-10, Apx 69a – 70a; Pump Station Discharge Records, Apx 1514a; Report on Sewerage System Operation, 4/1/60, Apx 1395a, Exhibit I, Apx 1406a – 1409a, and pp 1-4, Apx 1397a – 1400a)

2. THE CONTENT OF THE DISCHARGES

The Park tested the Fox Creek pumps at its new pump station on June 12, 1940. Fox Creek residents immediately complained of "pollution" in the creek. This first discharge and these first complaints are documented in a 6/17/40 letter from Detroit to the Park in which Detroit's

Department of Public Works reported that after the pumps were activated "we at once received complaints of odor and pollution" from people living near the creek. (Letter, 6/17/40, Apx 580a)

For the next 55 years, people living on the creek, government agencies and others repeatedly made and documented similar complaints. These complaints appeared in newspaper articles, government reports and studies, State Water Resources Commission documents, Wayne County Drain Commission documents, written resolutions of the Detroit City Council, numerous letters, newsletters published by Fox Creek community action groups, and the Park's own newsletters, studies and reports. This long public discourse and record was extensively documented in the trial court and, in conjunction with deposition testimony from the Park's City Manager, Pump Station Operator, Consulting Engineer, Mayor, and City Attorney, established the content of the discharges. The discharges were commonly recognized by the public, governmental agencies and the Park to have "polluted" and "contaminated" the creek and neighborhood with liquids, solids, odors, and waste, and posed a threat to public health. (Appendix A, Defendant's Brief in Support of Motion for Summary Disposition, Apx 572a - 786a; Krajniak Deposition[4], pp 18-20, Apx 452a – 453a; pp 22-24, Apx 453a – 454a, pp 25, Apx 454a, p 199-200, Apx 474a – 475a, p 275, Apx 487a, pp 350-351, Apx 489a; Allen Deposition, p 33, Apx 496, pp 78 & 108, Apx 504a and 507a; Deason Deposition, pp 63, 65-66, 73, 81-82 & 86, Apx 543a, 544a, 546a and 547a)

This documentary and testimonial evidence demonstrates that the Park's discharges into Fox Creek contained sanitary sewage consisting of urine and feces, E-coli bacteria, bath and dishwater, cleaning fluids, garbage disposal remains, solids such as toilet paper, feminine napkins, tampons and

[4] Deposition testimony is cited by deponent's last name, followed by "Deposition," and transcript pages.

condoms and other substances and solids introduced to the sewer system through surface street catch basins, including oil and gasoline. By way of example only as to this documentary and testimonial evidence:

- In 1941 and 1942, letters from Detroit to the Park again informed the Park of "pollution, in the creek," and that the discharges have caused "contamination" in Fox Creek." (Letters, 7/17/41 and 8/28/42, Apx 582a and 583a)

- In April 1950, the Water Resources Commission issued a Notice of Determination against the Park (and others) because the Park was "polluting Fox Creek..." (Apx 600a)

- In 1951, Detroit filed suit against the Park and other Pointe communities. Among other allegations in this Circuit Court complaint, it was alleged the Park was "unlawfully polluting Fox Creek..." (Apx 602a – 623a, specifically Apx 621a)

- In November 1959, Detroit City Council passed a resolution charging the Park with polluting Fox Creek, stating, in part, "...the pollution of Fox Creek has been the subject of discussion and a source of many complaints for many years..." and has resulted in the "contaminated condition" of Fox Creek. (Apx 625a, specifically Apx 626a and 627a)

- The discharges continued through the 1960's and late in that decade, more complaints were received by Detroit about the Park's discharges of sewage containing "human fecal matter, miles of toilet tissue and a gross or more of condoms per thousand gallons, all of which is left in obscene profusion." (Apx 635a)

- In 1971, the Park participated with other governmental entities in preparation of a written "Tentative Pollution Abatement Program" for Fox Creek that acknowledged, "combined sewer overflows" from the Park contributed to the "pollution" of Fox Creek. (Apx 640a, specifically, Apx 641a, 642a and 643a)

- In April 1983, the Fox Creek Facilities Plan Final Report was published declaring that the Park's combined sewer overflows to Fox Creek "degrade the water quality of both Fox Creek and the Detroit River ...," that Fox Creek becomes "rather polluted following overflow," this "pollution is quite detrimental to residents living along the canal," and the pollution of Fox Creek "is a serious problem." (Apx 663a, 664a, 664a and 389a)

- In June 1986, the Park discharged millions of gallons of sewage into Fox Creek. Newspaper articles followed -- "Suburb's Sewage Creates a Stink," and "Fox Creek Residents Disgusted With Sewage." These articles reported on "odor" and "unsightly" solids in the discharge and that residents "have been complaining for 30 years about the pollution of their waters by the City of Grosse Pointe Park." (Apx 672a and 673a)

- In April 1993, the Grosse Pointe News published two articles - "Fox Creek Still a Point of Contention Between Park and Canal Residents" and "Park Refuses to Require Residents to Disconnect Downspouts" -- documenting the "smell" produced by the discharges and referring to the content of the discharges as "human waste." (Apx 768a and 769a)

- Yet another newspaper article appeared in July 1994 in which the Park's City Manager is quoted to the effect that "the release of untreated storm water and sewage causes problems for residents who live by Fox Creek as well as posing potential health problems by introducing E-Coli bacteria into the water ..." (Apx 780a)

- A few months before the Etheridge suit, the Detroit City Council passed another resolution documenting that the discharges contained "untreated human waste" and "solid waste." (Apx 782a)

- The Park's City Manager testified the discharges included "waste" and "could" include anything leaving a garbage disposal, anything put down household drains and toilets, turpentine, cleaning fluids, laundry and bath soap, oil and gasoline and anything else that might come off the surface of a street. (Krajniak Deposition, pp 18-24, Apx 452a – 454a)

The United States Environmental Protection Agency's (EPA) extensive publications and declarations on the content of combined sewer overflows are less graphic but also show that such discharges contaminate and pollute receiving waters such as Fox Creek. In 1994, the EPA published its Combined Sewer Overflow (CSO) Policy; Notice in the Federal Register 59 CFR No. 75, April 19, 1994. (Apx 978a). This policy and public notice defined "combined sewer systems" and demonstrated the known content of overflows from such systems. A "combined sewer system," it says, "is a wastewater collection system owned by a ... municipality ... which conveys sanitary wastewater ... and storm water through a single–pipe system." This federal policy and notice identifies an untreated discharge from such a system as a "combined sewer overflow" or "CSO," consisting of "mixtures of domestic sewage, industrial and commercial wastewaters, and storm water run off" that:

> often contain high levels of suspended solids, pathogenic micro organisms, toxic pollutants, floatables, nutrients, oxygen-demanding organic compounds, oil and grease, and other pollutants ..." that "can cause exceedances of water quality

> standards" and "may pose risk to human health, threaten aquatic life and its habitat, and impairs the use and enjoyment of the Nation's water ways. 59 CFR No. 75, §I.A, p18689. (Apx 980a)

In 2001, the EPA's report to Congress on implementation and enforcement of the agency's CSO control policy provides a definition of a "combined sewer overflow" that recognizes the known content and adverse environmental and public health effects of CSO's. There, CSO's are defined as:

> ...discharges of raw sewage and storm water, and exhibit the characteristics of both. They contain a combination of untreated human waste and pollutants discharged by commercial and industrial establishments. The CSOs also contain solids, metals, bacteria, viruses, and other pollutants, washed from city streets and parking lots. CSO impacts include adverse health effects (e.g., gastrointestinal illness), beach closures, shellfish bed closures, toxicity for aquatic life, and aesthetic impairment.

This report identifies the "pollutants of concern" in CSO's, including bacteria such as fecal coliform and e-coli, viruses such as hepatitis and diphtheria, trash and floatables, organic compounds, metals, oil, grease and toxic pollutants, the consequences of which are reported to include beach closures, odors, drinking water contamination, aesthetic impairment, aquatic life impairment and adverse public health effects. Report to Congress, Implementation and Enforcement of the Combined Sewer Overflow Control Policy, December 2001, EPA 833-R-01-003, Chapter 2, pp 2-3 to 2-6. (Apx 1029a to 1032a) See also, the Summary of the August 14 – 15, 2002, Expert's Workshop on Public Health Impacts of Sewer Overflows, November 2002, EPA 833-R-02-002 (Apx 1185a – 1228a), and other EPA publications, reports and guidance documents addressing CSO's at the EPA's Combined Sewer Overflow web page: United States. Environmental Protection Agency. Combined Sewer Overflows. <http://cfpub.epa.gov/npdes/home.cfm?programs_id=5>.

D. THE UNDERLYING LITIGATION

1. THE ETHERIDGE COMPLAINT AND CLAIMS

The centerpiece of the Etheridge complaint was the Park's long-term "discharge" of sewage

into Fox Creek. The complaint cites specific discharges by date and discharges on "other occasions too numerous to list." It repeatedly uses the words "human waste," "waste," "sewage," and "untreated sewage" to describe the discharges. The content of the discharges is alleged to include "human waste, garbage, food, dirt, condoms, feminine hygiene products and other unknown materials" and "E-coli bacteria." The complaint alleged that sampling and testing of one discharge showed the presence of "120,000 parts per million of Escherichia Coli" in Fox Creek. The test report is attached to the complaint. The complaint also alleged the discharges killed wildlife and vegetation and were a "hazard to health" and "interfered with public health and safety." In part, it seeks damages for illnesses caused by the discharges. It also alleged the discharges caused "an extremely offensive and obnoxious odor." (Etheridge Complaint, ¶¶2 and 11 – "waste disposal," ¶¶17, 18, 20, 21, 22, 28, 34, 39, 46, 47, 49, 52, 66, 67 and 68 – "human waste," ¶¶25 and 26 – "Escherichia-coli," and attached Exhibits, Apx 342a)[5]

The claims of the Etheridge plaintiffs also appeared in answers to interrogatories. The plaintiffs reported in these answers that the discharges contained offensive floating solids such a condoms, feces, toilet paper and feminine hygiene products, had a highly offensive odor that lingered for days after each discharge, killed fish and other wildlife, were a threat to public health, and caused some plaintiffs to become sick. (Interrogatory Answers-Summaries, Apx 849a to 888a)

The Etheridge plaintiffs' written settlement demand claimed adverse health effects from the sewage and other unknown substances discharged into Fox Creek. Laboratory reports were attached

[5] The initial Complaint was followed by First Amended and Second Amended Complaints. The core allegations on the content of the discharges and the damage suffered are the same in all three complaints. (First Amended Complaint, 4/1/96, Apx 369a and 789a; Second Amended Complaint, 5/6/97, Apx 409a and 796a)

to the settlement demand showing the presence of arsenic, lead, cadmium and gasoline range organics in the bed of the creek and, per the settlement demand, "astronomical levels of e-coli bacteria" in the creek. (Settlement Demand Letter and attachments, 7/17/97, Apx 900a)

2. THE POOL'S RESERVATION OF RIGHTS

The Etheridge complaint was filed on September 14, 1995. On October 6, 1995, the Pool sent a letter to the Park reserving the Pool's rights under the coverage document. This letter is both general and specific. It notified the Park that the Pool was "reserving" its right to "restrict payments to those owed under the coverage contract" and that the Pool "will not pay any damages not covered by our contract." More specifically, the letter directed the Park's attention to the definition of "occurrence" and referred to the wrongful act exclusion, the taking of property exclusion, and the absolute pollution exclusion, restating each exclusion verbatim. Finally, the Pool informed the Park that the Pool would provide a defense to the Park in Etheridge but, "because you may have exposure to damages not covered by the coverage contract, you have the right to hire your own attorney." (Reservation of Rights Letter, 10/6/95, Apx 447a)

3. PAYMENT OF BASEMENT BACK-UP CLAIMS

It was the Park's experience, from time to time, that sewage backed up into Park homes that were connected to the Park's combined sewer system. Before and during the Etheridge case, the Pool covered these basement back-up claims for the Park. Before Etheridge, the Pool paid one back-up claim in 1992 and 66 claims in 1994, arising from a single back-up incident. After the Etheridge complaint was filed against the Park, the Pool defended and covered a 1996 back-up suit, the Walters case, filed by 58 home owners, again, arising from a single back-up incident. (Account Loss History, 1985-1997, Apx 1661a; and Walters complaint, 11/19/96, Apx 1614a)

4. THE POOL'S HANDLING OF THE ETHERIDGE CLAIM

The Pool provided the Park with a defense in Etheridge and reserved its right to deny indemnification coverage.[6] Typical for the Pool, an outside adjusting firm, retained by the Pool, handled the claim.[7] The adjustor assigned to the case authored the reservation of rights letter, monitored the course of the litigation, received copies of pleadings, attended meetings, court hearings and facilitation sessions, and reported to the Pool on the course of the litigation. As the case neared conclusion the Pool's outside coverage counsel expressed the opinion that coverage was not provided for the Etheridge claims for several reasons, including the pollution exclusion clause. The Park was so informed and was invited to respond. It did so but, in the end, coverage was denied and the Park and its co-defendant, the City of Detroit, settled the Etheridge litigation on their own. (Appendix B, Defendant's Brief in Support of Motion for Summary Disposition, Apx 787a-954a.)

A detailed chronology of the Etheridge case, its course through the court system, the Pool's actions in the case, and communications between the Pool and the Park as the case progressed is attached to this brief as "Etheridge Case Chronology." This chronology is based on Etheridge case and other documents and the testimony of key witnesses. The evidence in this chronological summary, particularly the deposition testimony of Park representatives, shows the Park was not misled about coverage by the manner in which the Pool handled the claim. (This evidence is

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[6] The defense was provided by Garan, Lucow, Miller, Seward & Becker, through lead defense counsel, John McSorley. The Park has never claimed that Mr. McSorley was not fully independent in his defense of the Park in Etheridge or that the defense provided was detrimental to the Park's interests or lacking in any way.

[7] The Pool's adjusting firm was Meadowbrook Insurance Group. The adjustor was Pamela Garrison. (See Reservation of Rights Letter, Apx 447a, and Appendix B, Defendant's Brief in Support of Motion for Summary Disposition, Apx 787a-954a.)

discussed further under Argument III.)

E. THE COVERAGE DOCUMENT

The Park purchased its first insurance policy from the Pool commencing August 1, 1985. Thereafter, the Park applied for and purchased one-year occurrence based policies, effective on 8/1 of every year through and including 1995. This case has been litigated under the policy issued 8/1/95, referred to as the "coverage document." (Coverage Document, Apx 289a)

1. COVERAGES PROVIDED

The coverage document provided standard municipal insurance, including coverage for bodily injury and property damages caused by an accident or event that is not expected or intended from the standpoint of the member.[8] Coverage was also provided for personal and advertising injury, errors and omissions, and other insurance. Each coverage was subject to the limitation "to which this coverage applies" and to clearly identified "general" exclusions to all coverage.

2. GENERAL EXCLUSIONS

The coverage document contains several general exclusions to all coverages. Pertinent to this appeal, the general exclusions include an exclusion from coverage for damage arising out of the alleged or actual discharge of a pollutant. In full, this exclusion provides that "coverage does not apply" to:

> Bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants:

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[8] The coverage document identifies the insured municipality as a "Member." The Pool is sponsored by the Michigan Municipal League. Only members of the League may purchase Pool insurance. The Pool exists to serve municipalities only, pursuant to a statutorily authorized Intergovernmental Contract for a Municipal Group Self-Insurance Pool. MCLA 124.5; MSA 5.4085 (6.5). Within the coverage document, several words and phrases are capitalized. Typically, these are words and phrases defined in the policy's "Definitions" section. For clarity, lower case characters are substituted in this brief.

(1) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any member;

(2) At or from any premises, site or location which is or was at any time used by or for any member or others for the handling, storage, disposal, processing or treatment of waste;

(3) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any member or any person or organization for whom you may be legally responsible; or

(4) At or from any premises, site or location on which any member or any contractors or subcontractors working directly or indirectly on any member's behalf are performing operations:

(a) if the pollutants are brought on or to the premises, site or location in connection with such operations by such member contractor or subcontractor; or

(b) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

Subparagraphs (1) and (4)a. do not apply to Bodily Injury or Property Damage arising out of heat, smoke or fumes from a hostile fire.

As used in this exclusion, a hostile fire means one, which becomes uncontrollable or breaks out from where it was intended to be.

Any Loss, cost or expense arising out of any:

(1) Request, demand or order that any member or others test for, monitor, clean up, remove, contain, treat detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or in any way responding to, or assessing the effects of pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

(Coverage document, pp 33-34 of 47, Apx 327a – 328a)

F. LOWER COURT RULINGS

1. TRIAL COURT ARGUMENTS AND RULINGS

After lengthy pre-trial discovery, this case arrived before the trial court on January 7, 2000, for a hearing on cross-motions for summary disposition under MCR 2.116(C)(10). The court's Final Order and Judgment was entered on June 15, 2000, after oral argument and other proceedings on January 7, February 25, and May 19, 2000. There is no written opinion. The basis for the trial court's rulings appears on the record of these hearings. (Final Order & Judgment, Apx 24a; Trial Court Transcripts, Apx 206a, 269a & 283a).

In the trial court, the Park asserted that its discharges to Fox Creek were an accident or event not expected or intended by the Park, a covered error and omission, and an invasion of the right of private occupancy and, therefore, covered under the personal and advertising injury endorsement. The Park also alleged that the Pool had committed a tort (breach of a duty to timely notify an insured of a coverage decision) separate from its contract claims. The parties filed cross-motions for summary disposition on all of these issues, none of which remain pertinent at this time.

The Park did not claim in the trial court that sewage was not a pollutant. That estoppel applied was the only argument made by the Park in the trial court as to the pollution exclusion clause. Because the Pool had covered back-up claims and because of the manner in which the Pool was alleged to have handled the Etheridge claim, the Park argued the Pool should be estopped from asserting or had waived the exclusion. The Pool's assertion that combined sewage was a pollutant, made as part of its (C)(10) motion in the trial court, went unchallenged by the Park.

Among other rulings, the trial court held that the Pool was estopped from asserting the

pollution exclusion solely because the Pool covered back-up claims for the Park. Before making this decision, though, the trial court did find that sewage is a pollutant under the exclusion: "I got a '93 case right on point: and sewage is a pollutant." Referring specifically to the exclusion clause, the court found, "Well the clause is clear and unambiguous. The court is satisfied that a pollutant is a pollutant. And the court is satisfied there is case law out there that suggests that sewage is a pollutant." (Trial court transcript, 1/7/00, pp 22 & 28, Apx 227a and 233a)

2. THE COURT OF APPEALS' DECISIONS

With a strong dissent from Judge O'Connell, the Court of Appeals majority found the Pool's payment of basement back-up claims to be "extrinsic evidence" of "ambiguity" in the pollution exclusion and remanded the case to the trial court on the question of "the parties' intent as to the exclusion's applicability." The majority also ruled that, if the trial court found no ambiguity in the pollution exclusion, it may then consider estoppel. The Pool's payment of basement back-up claims and the manner in which the Pool handled the Etheridge claim may operate, the majority said, to estop the Pool from asserting the exclusion, in spite of the Pool's timely reservation of its right to deny indemnification coverage. (Majority pp. 6-11, Apx 33a - 38a)

Judge O'Connell found the pollution exclusion to be unambiguous and applicable to combined sewage. He held that extrinsic evidence may not be considered to create an ambiguity in the contract where none exists on the face of the contract. The dissent also held that the Pool may not be estopped from asserting the pollution exclusion because estoppel "does not apply to expand a policy's express coverage," and payment of other claims does not preclude an insurer's later assertion of an applicable exclusion, particularly when the Pool "preemptively retained its right to assert the exclusion" through a reservation of its rights. (Dissent, Apx 43a - 44a)

SUMMARY OF ARGUMENT

The issues presented in this case direct this Court's attention, once again, to the role of our courts in the enforcement of privately agreed to obligations; not an insignificant matter. Indeed, as this Court has recognized, how the judiciary responds to issues of contract interpretation is of constitutional magnitude because the task implicates no less than the freedom of contract. Wilke v Auto-Owners Insurance Company, 469 Mich 41, 51-52; 664 NW2d 776 (2003). In addition, scholars and economists have long recognized that predictable and accurate contract enforcement of private agreements is indispensable to modern economies with their need for a broad array of enforceable contracts. See generally, Atiyah, P.S. An Introduction to the Law of Contracts (3d ed) 1981, pp 2-6. Consistent with this and controlling precedent, this Court has had occasion to emphasize that contracts in Michigan will be enforced according to their plain meaning. See e.g., Wilke, supra; and, Twichel v MIC General Insurance Corporation, 469 Mich 524, 534-535; 676 NW2d 616 (2004). In these and other cases, this Court has expressed fidelity to long-recognized and well-justified rules of contract construction including, primarily perhaps, the rule that a contract must be enforced as written.

These broad and more specific principles apply here and, if applied, require reversal because the Court of Appeals majority failed to follow applicable rules of contract construction, ignored the plain meaning of an insurance contract exclusion clause, and saw possible contract ambiguity in extrinsic evidence. Not surprisingly, the parties now find themselves with a contract different than the contract to which they agreed. The lower court compounded these errors by permitting the insurer to be estopped from relying on a clear and applicable exclusion after it had reserved its right in a timely fashion to deny coverage on the basis of that exclusion and other contract provisions.

These rulings are directly contrary to the simple yet significant societal and judicial rule that a contract must be enforced as written and according to its clear and unambiguous terms.

Hence, this case presents the Court with three issues, each of which concern the analytical framework for resolving contract disputes. The result on each issue will or detract from this Court's commitment to the "freedom of contract," demonstrated in its consistent interpretation and enforcement of contracts as written. First, the Court will decide whether a substance long recognized to be "waste" and a "contaminant" is a "pollutant," as defined within the contract at hand. Second, the court will determine whether a Court, in fulfillment of its duty to determine whether a contract is ambiguous, may look to extrinsic evidence beyond the four corners of the contract. Finally, the court will be asked to determine whether an insurer may be estopped from enforcing a policy exclusion when it has properly defended its insured and timely reserved its right to deny indemnification coverage.

The Michigan Municipal Liability and Property Pool contends that sewage is a pollutant under the absolute pollution exclusion clause and, because the clause is clear and unambiguous, extrinsic evidence may not be employed to establish ambiguity within the clause. In addition, because the Pool defended the City of Grosse Pointe Park in underlying litigation while reserving its right to deny indemnification coverage, it may not be estopped from doing so, as a matter of law. Furthermore, because the Park failed to present any evidence in the trial court to support its estoppel claim, it failed to satisfy its burden under the law applicable to motions for summary disposition based on a claim that there are no genuine issues of material fact.

The absolute pollution exclusion clause applies to "damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants" from certain

locations or under certain circumstances clearly defined in the contract. The policy defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." This clause is clear. It contains commonly understood words that apply in this case. This Court has held that, when interpreting a contract, a court must give the words used their common meaning and may not give contract language an "alien construction merely for the purpose of benefiting an insured." Henderson v State Farm Fire and Casualty, 460 Mich 348, 354; 596 NW2d 190 (1999). Reading this exclusion and its definition of pollutants in this fashion, it is clear that damage caused by the discharge of sewage, commonly understood to be a solid or liquid contaminant and waste, falls squarely within the exclusion. This common understanding is apparent from the extensive trial court record in this case and is confirmed by reference to dictionary definitions. Furthermore, when they have followed controlling rules of contract construction, courts in Michigan and in other jurisdictions have found that sewage is, without doubt, a pollutant under the absolute pollution exclusion clause. See e.g., Hydrodynamics, Inc. v Auto-Owners Insurance Company, No. 193389, LC No. 95-502392-CZ (Mich App, July 11, 1997) (unpublished) (Exhibit 1); Michigan Municipal Risk Management Authority and City of Westland v Seaboard Surety Company, et al., No. 235310 (Mich App, August 7, 2003) (unpublished) (Exhibit 2); Royal Insurance Company v Bithell, 868 F Supp 878 (ED Mich 1993); Blackhawk-Central City Sanitation District v American Guarantee and Liability Insurance Company, 214 F 3d 1183 (10th Cir 2000).

The second question presented also implicates the freedom of contract. The Court of Appeals' majority erred when it held that the Pool's coverage of basement back-up claims may be considered by the trial court on remand to find "ambiguity" in the pollution exclusion clause. This

holding was supported in the Court of Appeals by citation to one case - Michigan Millers Mutual Insurance Company v Bronson Plating, 197 Mich App 482; 496 NW2d 373 (1992). Yet, the idea that a court may venture "beyond the contract's bounds in search of potential ambiguities that may lurk among the parties' extraneous dealings," as the dissent described the majority's ambiguity rule (Dissent, p2, Apx 44a), is bad law and has been soundly rejected by controlling precedent. Extrinsic evidence may not be used to create an ambiguity in a contract when no ambiguity is apparent from a fair reading of the text. Upjohn Company v New Hampshire Insurance Company, 438 Mich 197; 476 NW2d 373 (1992); Sheldon-Seatz, Inc. v Coles, 319 Mich 401; 29 NW2d 832 (1947); Klapp v United Insurance Group, 468 Mich 469, 474; 663 NW2d 447 (2003).

Furthermore, the pollution exclusion clause is not subject to more than one reasonable interpretation. Therefore, it is clear and unambiguous. Michigan courts and courts from other jurisdictions agree that this exclusion is clear and unambiguous. See McGuirk Sand & Gravel, Inc. v Meridian Mutual Insurance Company, 220 Mich App 347; 559 NW2d 93 (1996); McKusick v Travelers Indemnity, 246 Mich App 329; 632 NW2d 525 (2001); Peace v Northwestern Mutual Insurance Company, 228 Wis 2d 106; 596 NW2d 429 (1999); Madison Construction Company v The Harleysville Mutual Insurance Company, 557 Pa 595; 735 A2d 100 (1999), for example.

Similarly, the third issue presented compels this Court to announce a rule that furthers the ability of parties to an insurance contract to enforce their contract as written. The alternative suggested by the lower court is a free-flowing equitable approach to insurance contract interpretation, the extreme nature of which is seen in the majority's finding that an insurer's setting of "reserves" on a claim may be at variance with a reservation of rights. (Majority, p 10, Apx 36a) This is directly contrary to controlling precedent to the effect that estoppel does not apply when an insurer provides a

defense under a timely reservation of rights, including, for example, Allstate v Keillor, 203 Mich App 36; 511 NW2d 702 (1993); Smit v State Farm Mutual Automobile Insurance Company, 207 Mich App 674; 525 NW2d 528 (1994); Kirschner v Process Design Association, 459 Mich 587; 592 NW2d 707 (1999). Moreover, as the dissent recognized, the majority's estoppel ruling conflicts with the classic rule that estoppel does not apply to broaden a policy to "cover a loss never covered by its terms ..." and "create a liability contrary to the express provisions of the contract the parties did make." Ruddick v Detroit Life Insurance Company, 209 Mich 638; 117 NW 242 (1920). (Dissent, p 2, Apx 44a) Moreover, the Park failed to present any evidence in the trial court on the critical elements of estoppel – justifiable reliance and prejudice. For this reason, too, the lower court ruling on estoppel is clear error under the applicable court rule, MCR 2.116(C)(10), and controlling case law on the standards for review of a motion for summary disposition. Smith v Globe Insurance Company, 460 Mich 496; 597 NW2d 28 (1999), and others.

In the broader sense, if the lower court's rules on ambiguity and estoppel are adopted, parties in Michigan will be less secure in their contract relations. In fact, without reversal here, no party to a contract in Michigan will ever rest safe in the understanding that his contract will be enforced as written. Instead, under the rules propounded in the lower courts in this case, a party disappointed by the explicit terms of a contract will have great incentive to find, even create, extrinsic facts that might permit escape from those explicit terms or to see estoppel in the entirely innocent acts of an insurer, including payment, for any number of reasons, on other claims. The lack of stability and predictability in contractual relations to be engendered by such rules should not be tolerated by this Court. In short, the Pool appears before this Court now because the courts below failed to follow applicable rules of contract construction and controlling precedent, as the dissent in the Court of

Appeals noted. Therefore, the arguments that follow pay careful attention to these rules and controlling precedent, and their application to the facts of this case. Doing so ensures that the parties' contract will be enforced as written. Doing so, the Pool submits, compels a different result in this case.

ARGUMENT

As noted, the rules of contract construction are critical to the proper resolution of any case of contract interpretation and no less so in this case. Thus, the rules of construction, which are especially applicable to issues I and II, are set out here in detail.

An insurance policy must be enforced as written and in accord with its terms. Upjohn Company v New Hampshire Insurance Company, 438 Mich 197; 476 NW2d 411 (1991). The terms used in an insurance policy are given their commonly used meaning. Group Insurance Company v Czopek, 440 Mich 590, 596; 489 NW2d 444 (1992); Arco Industries Corporation v American Motorists Insurance Company, 448 Mich 395, 403; 531 NW2d 168 (1995). Technical or constrained constructions are to be avoided. UAW-GM Human Resource Center v KSL Recreation Corporation, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). When determining the common and ordinary meaning of a word or phrase in a contract, use of dictionary definitions is appropriate. Stanton v City of Battle Creek, 466 Mich 611, 617; 647 NW2d 508 (2002).

The initial determination of whether a contract is ambiguous is a question of law for the court and, in the absence of ambiguity, the meaning of the contract is, likewise, a question of law. Port Huron Education Association v Port Huron Area School District, 452 Mich 309, 323; 550 NW2d 228 (1996). A court determines whether an insurance policy is clear and unambiguous on its face. Upjohn Company, supra. A court may not create an ambiguity where none exists. Auto-Owners

Insurance Company v Churchman, 440 Mich 560, 567; 489 NW2d 431 (1992); Fire Insurance Exchange v Diehl, 450 Mich 678, 687; 545 NW2d 602 (1996). Clear and unambiguous language may not be rewritten under the guise of interpretation. Upjohn, supra at 207; South Macomb Disposal Authority v American Insurance Company, 225 Mich App 635, 653; 572 NW2d 686 (1997); UAW-GM Human Resource Center, supra. A party's "reasonable expectations" have no application to an unambiguous contract. Wilkie, supra, at 63.

An insurance contract is ambiguous when its terms are capable of conflicting interpretations; if the contract's "words may reasonably be understood in different ways." Raska v Farm Bureau Insurance Company, 412 Mich 355, 362; 314 NW2d 440 (1982); Farm Bureau Mutual Insurance Company v Nikkel, 460 Mich 558, 566; 596 NW2d 915 (1999). If the meaning of a contract is ambiguous or unclear, the trier of fact is to determine the contract's meaning. Chrysler Corporation v Brencal Contractors, Inc., 146 Mich App 766, 775; 381 NW2d 814 (1985); Klapp, supra, at 469.

Insurance exclusionary clauses "are strictly construed in favor of the insured...coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claim...clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume." (citations omitted) Churchman, supra, at 567; South Macomb Disposal Authority, supra, at 653-654.

Had the lower courts actually followed and properly applied these rules, the result in the lower courts would have been different in this case, as the argument that follows demonstrates.

ARGUMENT I

BECAUSE SEWAGE IS A SOLID AND LIQUID CONTAMINANT, INCLUDING WASTE, IT IS A POLLUTANT UNDER THE POLLUTION EXCLUSION CLAUSE

Coverage does not apply in this case to damage arising out of the actual or alleged discharge

of pollutants from certain sites owned by a member or used by a member to transport, store or dispose of waste. Pollutants are defined as any solid or liquid contaminant, including waste. Under the applicable rules of contract construction, ignored by the trial court and majority in the Court of Appeals, there is no doubt that the sewage discharged into Fox Creek by the Park was a pollutant under the pollution exclusion clause. Giving the words of the exclusion their common meaning and avoiding a technical and constrained construction leads, inextricably, to this result. Furthermore, every Michigan court that has considered this issue and numerous other courts have held that sewage is a pollutant under this or similar pollution exclusion clauses.

A. SEWAGE IS INCLUDED WITHIN THE COMMON MEANING OF "CONTAMINANT" AND "WASTE" AND IS, THEREFORE, A POLLUTANT

What the Park discharged into Fox Creek was, for 55 years, commonly understood to be a contaminant and to contain waste. This "common meaning" is overwhelmingly demonstrated by the record in this case, including historical documents, deposition testimony, the Park's own pleadings, U.S. Environmental Protection Agency findings, and the Etheridge complaint and claims. Beyond this clear record, dictionary definitions serve to confirm that sewage is a contaminant and waste and, therefore, is a pollutant under the pollution exclusion clause. Following this Court's direction, this is the only issue addressed in Argument I. Whether the pollution exclusion clause is ambiguous is addressed in Argument II.

1. THE RECORD IN THIS CASE DEMONSTRATES THAT SEWAGE IS A POLLUTANT

The documentary record of the Park's discharge[9] of sewage into Fox Creek, quite naturally,

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[9] There is no doubt that when the Park pumped combined sewage into Fox Creek, it was engaged in a "discharge," as that word is used in the pollution exclusion. The 1938 contract that authorized the Park to do so identifies this action as a "discharge" and the pipe to be used for this
(continued on next page)

provides this Court with the exact words and language used by people to describe and characterize what the Park discharged into the creek for 55 years. These various descriptions leave no doubt that what the Park discharged into Fox Creek was plainly and commonly understood to be both a liquid and solid contaminant and waste. For example, the following descriptions of the discharges appear in this written record, consisting of letters, government reports and resolutions, newspapers articles, and similar documents: "contamination in Fox Creek" (Apx 583a); "obnoxious debris" (Apx 588a); "contamination" (Apx 594a); "contamination" (Apx 596a); "contaminated condition" (Apx 627a); "scum of filthy, dirty sewage" (Apx 629a); "contaminate the waters of said creek" (Apx 630a); "solids and substances of human sewage" (Apx 630a); "human fecal matter, miles of toilet tissues and...condoms" (Apx 635a); "horribly polluted liquid" (Apx 636a); "standing sewage" (Apx 665a); "stagnant sewage" (Apx 666a); "everything you flush down the toilet" (Apx 656a); "raw sewage floating down the canal" (Apx 672a); "condoms, sanitary napkins and raw sewage" (Apx 673a); "offensive floating materials" (Apx 690a); "waste" (Apx 747a); "human waste" (Apx 748a); "human waste" (Apx 750a); "wastewater" (Apx 751a); "fecal matter, tampons and condoms" (Apx 752a); "wastewater" (Apx 753a); "waste" (Apx 760a); "human waste" (Apx 763a); "solid waste" (Apx 763a); "garbage and human waste" (Apx 768a); "human feces, condoms and tampons" (Apx 774a); "contamination" (Apx 781a); "untreated human waste" (Apx 782a); and, "solid waste" (Apx 782a).

(continued from previous page)
purpose as a "discharge" conduit. This action is repeatedly referred to as a "discharge" throughout the historical record, including the National Pollutant Discharge Elimination System (NPDES) permits issued to the Park, the Park's own pleadings, its storm Water Release Procedure, the Etheridge complaint, and many other documents. (1938 contract, pp. 1, 2, 3, and 5, Apx 572a, 573a, 574a and 576a; 1975 Permit, Apx 1594a; 1978 Permit, Apx 957a; 1991 Permit, Apx 1423a; 1995 Permit, Apx 1598a; Park's Brief in Support of Motion for Partial Summary Disposition as to Inapplicability of Pollution Exclusion, pp 1 & 11, Apx 115a & 125a; Storm Water Release Procedure, Apx 1638a; Etheridge complaint, Apx 342a.)

Additionally, the State discharge permits issued to the Park state the discharges include "water-carried waste," and "waste water," or describe the facilities regulated by the permits as "waste collection...facilities." (1975 Permit, Apx 1597; 1978 Permit, Apx 958a and 959a; 1991 Permit, Apx 1432a; 1995 Permit, Apx 1598a and 1611a)

The Park itself acknowledged it discharged "waste" into Fox Creek. In a brief filed in the trial court, the Park admitted that combined sewer flow "represents potential health risks because of the waste element it contains." Consistent with this, the Park's City Manager testified that the Park's discharges into Fox Creek contained "waste." (Park Brief on Coverages A and D, p 12, Apx 160a; Krajniak Deposition, pp 18-22, Apx 452a – 453a)

As noted, the complaint filed by the Fox Creek residents against the Park repeatedly used the words "human waste" and "waste" to describe the discharges. It also alleged the discharges contained "garbage, food, dirt, condoms, feminine hygiene products, and other unknown materials," and "e-coli bacteria," killed birds, fish, and plants, were a "hazard to health," and produced obnoxious odors. (See "Etheridge Complaint and Claims," p 9, above, and Apx 342a)

As also noted, the EPA has published its Combined Sewer Overflow (CSO) Policy and Notice in the Federal Register and several reports addressing the content and consequences of CSO's. As the government has learned and reported, CSO's are generated by combined "wastewater" systems and contain "untreated human waste," "solids," "bacteria," and "viruses" that result in beach closures, toxicity to aquatic life, aesthetic impairment, and the threat of human disease and illness. (See "Content of the Discharges," pp 7-8, above, and Apx 978a, 990a and 1185a)

2. DICTIONARY DEFINITIONS CONFIRM THAT SEWAGE IS A CONTAMINANT AND WASTE AND IS, THEREFORE, A POLLUTANT

Dictionary definitions serve to confirm that a combination of water and raw sewage, containing solid and degraded feces, e-coli bacteria, urine, the enumerated floating solids, and oil, gasoline and other substances that enter sewers through street catch basins, is both a liquid and solid contaminant and waste, as used in the pollution exclusion. "Contaminant" is defined as "that which contaminates." The word "contaminate" includes, "to make impure or corrupt by contact or mixture" and "to render (water otherwise satisfactory) unfit for specified use, as by the introduction of bacteria, sewage, etc." or "to make inferior or impure by mixture; to pollute...." American Heritage Dictionary of the English Language, New College Edition, 1981, and Webster's New International Dictionary of the English Language, Second Edition, Unabridged, 1961, respectively. The dictionary definition of the noun "waste" includes "...the undigested residue of food eliminated from the body" and "refuse from places of human or animal habitation; specif., sewage...." American Heritage Dictionary of the English Language, New College Edition, 1981 and Webster's New International Dictionary of the English Language, Second Edition, Unabridged, 1961, respectively.

B. MICHIGAN AND OTHER COURTS HAVE DETERMINED TO BE A POLLUTANT

Since 1993, several Michigan courts, applying the applicable rules of contract construction, have found that sewage is a pollutant under pollution exclusion clauses matching or closely identical to the clause at hand, including two federal district courts, the Sixth Circuit Court of Appeals, and two panels of the Michigan Court of Appeals. In 1997, the Court of Appeals found the absolute pollution exclusion precluded coverage for a sewage back-up claim in Hydrodynamics, Inc. v Auto-Owners Insurance Company, No. 193389, LC No. 95-502392-CZ (Mich App, July 11, 1997)

(unpublished) (Exhibit 1). The Hydrodynamics court considered an exclusion for damage "arising out of the actual, alleged, or threatened discharge,...of pollutants" and found a mixture of raw sewage and water to be a "pollutant." More recently, the Court of Appeals addressed the application of the absolute pollution exclusion to the back-up of combined sewage into several hundred residential basements in the City of Westland. Michigan Municipal Risk Management Authority & City of Westland v Seaboard Surety Company, Case No. 235310 (Mich App, August 7, 2003) (unpublished) (Exhibit 2). The complaint in City of Westland alleged the back-up included "raw sewage containing water, urine, fecal matter, used toilet products, debris, dirt, noxious odors, and other organic and inorganic contaminants of unknown origin and toxicity." Based on this allegation and proof, and because the absolute pollution exclusion applies to an alleged discharge of any solid, liquid or gaseous contaminant, including waste, the exclusion was found to exclude coverage for the claims.

Two decisions of the United States District Court for the Eastern District of Michigan have also found the exclusion to exclude coverage for damage allegedly caused by sewage that backed up into residential basements. In Royal Insurance Company v Bithell, 868 F Supp 878, 880-881 (ED Mich 1993), the court found raw sewage to be a "contaminant" under an exclusion in a home owner's policy that barred coverage for loss "caused by...release, discharge, or dispersal of contaminants or pollutants." As the court said, "there is no question that the raw sewage that leaked into defendants' home is a 'release, discharge, or dispersal of contaminants or pollutants.'" More recently, in United State Fire Insurance Company v City of Warren, Civil Case No. 00-40237 (ED Mich, Nov. 6, 2001) (unpublished) (Exhibit 3), the court addressed a pollution exclusion clause that defined pollution as any solid or liquid contaminant, including waste, and found that any back-up of

raw sewage into homes from the City's sewer would be a discharge of a pollutant. This is so, the court said,

> because 'raw sewage is clearly a contaminant' and that would be covered by an exclusion from coverage of any 'loss caused by release, discharge, or dispersal of contaminants or pollutants...

The trial court's finding in City of Warren was affirmed on appeal when the Sixth Circuit found, as a mater of contractual interpretation, that the pollution exclusion,

> ...clearly pertains to the escape of sewage waste into the property of the Warren homeowners. The influx of sewage into the homes of various Warren residents constituted an 'escape' of waste water and sewage....We think that it is composed of solid, liquid [or] gaseous...irritant[s] or contaminant[s], including...waste. The sewage that escaped falls squarely under the definition of pollutant and the pollution exclusion therefore applies to exclude coverage ... for these claims.

United States Fire Insurance Company v City of Warren, Case Nos. 02-1066, 02-1082, 02-1085 (6th CIR, Dec. 23, 2003) (unpublished) (Exhibit 4).

Courts in other jurisdictions, state and federal, have also found that sewage, the odor created by sewage, and kitchen grease to be "pollutants" as used in an absolute or similar pollution exclusion clauses. Black Hawk-Central City Sanitation District v American Guaranty and Liability Insurance Company, 214 F 3rd 1183, 1190 (10th Cir 2000) (the discharges of sewage and effluent); City of Salina, Kansas v Maryland Casualty Company, 856 F Supp 1467, 1479 (D KAN 1994) (alkaline waste water is a pollutant, irritant and contaminant); East Quincy Services District v Continental Insurance Company, 864 F Supp 976 (ED Cal 1994) (fecal, coliforum and other sewage borne bacteria are pollutants under a definition that included "biological and etiological agents," citing Michigan's earliest sewage case, Royal v Bithell, supra); Panda Management Company, Inc. v Wausau Underwriters Insurance Company, 73 Cal Rptr 2d 160 (App 2d Dist 1998) (cooking oil and grease were waste under the absolute pollution exclusion); and, Boulevard Investment Company v

Topical Indemnification Corporation, 27 SW3d 856 (MO Ct App ED 2000) (grease and other kitchen waste found to be "waste" under the absolute pollution exclusion based, in part, on the dictionary definition of "waste" including "refuse from places of human or animal habitation.") City of Bremerton v Harbor Insurance Company, 92 Wash App 17; 963 P 2d 194 (Wash App 1998) (emission of toxic and noxious gases, odors and fumes from municipal sewage treatment plant).

Indeed, in their complaint and answers to interrogatories, the Etheridge plaintiffs alleged the Park's discharges caused "an extremely offensive and obnoxious odor." This report appears repeatedly in the historical record. Newspaper articles, for example, had these titles: "A Stink Over Reek from Creek," "Plan Will Clean Up Smelly Creek," and "Suburb's Sewage Creates a Stink." The American Heritage Dictionary of the English Language, New College Edition, 1981, defines "fume" to include "a strong or acrid odor." On this basis, too, the sewage discharged into Fox Creek that generated an obnoxious odor, was a pollutant under the pollution exclusion clause, which includes "fumes' within its list of contaminants.

C. COVERAGE IS EXCLUDED IF POLLUTANTS ARE DISCHARGED FROM ONE OF FOUR LOCATIONS, THREE OF WHICH APPLY HERE

The last component of the absolute pollution exclusion analysis focuses on the source of the discharge. The exclusion applies when a discharge of pollutants emanates from any one of four described locations or circumstances. Three of the four described locations or circumstances apply to preclude coverage in this case. First, a discharge "at or from premises you own, rent, or occupy" is excluded. As the record demonstrates, the Park discharged sewage into Fox Creek from the Park's own discharge pipe and through its own pumping station and sewer system.

Second, a discharge "at or from any site or location used by or for you or others for handling, storage, disposal, processing or treatment of waste" is excluded. The Park's sewer system qualifies

as a site or location used for the handling, storage or disposal of waste. The system is specifically designed for the purpose of handling waste, including human body waste, produced in the Park and flushed into or otherwise drained into the Park's sewer system. And, as demonstrated in the paragraph below, the Park's sewer system and pipes are also used for the "storage" of waste.

Lastly, a discharge of pollutants, "which are at any time transported, handled, stored, treated, disposed of, or processed as waste," is excluded from coverage. The purpose of a sewer system is to transport, handle and store wastewater and sewage waste. It is commonly accepted that sewage systems are used for the purposes of transporting sewage. For example, the State discharge permits given to the Park refer to the Park's sewer system as a means of "transporting" or "transportation" of combined sewage. It is also commonly accepted and typical for sewer systems to be used to store sewage. See, for example, the EPA's Combined Sewer Overflow Technology Fact Sheet, Maximization of In-Line Storage. EPA 832-F-99-036, September 1999. (Apx 1229a) Also, the Park has admitted in pleadings filed in the trial court that its sewer system was used for "storage" and "storage" was identified as one purpose of the system in Park engineering reports, in the Park's Storm Water Release Procedure, and by the Court of Appeals in this case. (Plaintiff's Common Statement of Facts, Apx 61a, p 8, Apx 70a; Combined Sewer Overflow Study, Apx 1436a, pp 10 & 17, Apx 1447a and 1454a; Storm Water Release Procedure, Apx 1638a; Majority, p 2, Apx 29a)

ARGUMENT II

BECAUSE THE POLLUTION EXCLUSION CLAUSE IS CLEAR AND UNAMBIGUOUS ON ITS FACE EXTRINSIC EVIDENCE MAY NOT BE USED TO ESTABLISH AN AMBIGUITY

The majority in the Court of Appeals held that extrinsic evidence is admissible to establish ambiguity within the pollution exclusion clause. (Majority p 7, Apx 34a) The extrinsic evidence

identified by the lower court was the fact that the Pool had covered certain basement back-up claims in the Park, without asserting the pollution exclusion clause. The majority below instructed the trial court to consider this extrinsic evidence without first assessing whether the pollution exclusion clause is ambiguous on its face. The lower court's sole legal basis for this ruling was Michigan Millers Mutual Insurance Company v Bronson Plating Company, 197 Mich App 482, 495; 496 NW2d 373 (1992), aff'd on other grounds, 445 Mich 558; 519 NW2d 864 (1994), where the court did say that "extrinsic evidence is admissible to show the existence of an ambiguity." Yet, this rule is directly contrary to Michigan law and analysis of the Bronson court's source for this rule demonstrates its complete lack of precedential or valid theoretical basis.

A. UNDER THE RULES OF CONTRACT CONSTRUCTION AND CONTROLLING PRECEDENT, EXTRINSIC EVIDENCE MAY NOT BE USED TO ESTABLISH AMBIGUITY IN A CONTRACT

The lower court's reliance on the sweeping and unqualified declaration that "extrinsic evidence is admissible to show the existence of an ambiguity" is simply bad law. The source for this rule, according to the court in Michigan Millers v Bronson, supra, is the case of Mayer v Auto-Owners Insurance Company, 127 Mich App 23; 338 NW2d 407 (1983). Mayer suffered a fire loss. His insurer refused to pay a portion of the loss. Interpretation of a contract provision was disputed and the trial court found it to be unambiguous. The appellate court agreed but, in doing so, said, "the question of whether an ambiguity exists is for the court, which may consider extrinsic facts." However, for this proposition, the Mayer court cited two sources. Dykema v Muskegon Piston Ring, 348 Mich 129; 82 NW2d 647 (1957), and 17A CJS, Contracts, §617, pp 1254-1256, neither of which provides a basis for the rule. In fact, the treatise section cited and the following section within Corpus Juris Secondum actually stand for the proposition that extrinsic evidence is not admissible as

to an unambiguous contract.

In Dykema, a writing preceding a sale transaction was alleged to be a misrepresentation and the plaintiff sought to have the issue of interpretation submitted to the jury. The court disagreed, citing the accepted rule that, "where the language of a writing is not ambiguous its construction is for the court ...". (at 138) In fact, Dykema does not address extrinsic evidence at all and Section 617 of Corpus Juris Secondum, now Section 786, simply states that "...the construction and legal affect of an ambiguous contract are questions of law, although where its meaning depends on extrinsic evidence which is in material conflict, or capable of more than one inference, a question of fact is presented." Hence, the basis cited for the rule in Michigan Millers v Bronson, that "extrinsic evidence is admissible to show the existence of an ambiguity," does not support the rule. Dykema and the cited Section of Corpus Juris Secondum stand for the well-recognized rule that construction of a contract is a question of law for the court and the fact finder is called upon to determine the meaning of an ambiguous contract. In fact, the next succeeding section of this legal encyclopedia provides that, "the presentation of extrinsic evidence in aide of construction or interpretation of a contract is generally permitted only where the court determines that the contract at issue is ambiguous." 71B CJS Contract §787.

As early as 1920, this Court held that evidence regarding the making of a contract was admissible as an aid in interpretation when the language of the contract itself is "obscure." In Michigan Crown Fender Company v Welch, 211 Mich 148, 164; 178 NW 684 (1920), this Court said,

> The testimony admitted by the court touching the circumstances attending making of the contract, was competent, not to contradict the written agreement, as plaintiff contends, but as an aid in its interpretation. For such purpose, when the language is obscure or the implications claimed not imperatively manifest, both preliminary

negotiations and surrounding circumstance may be considered.

Some years later, this Court found occasion to more explicitly state the rule and to direct trial courts to look to the contract before consideration of "extrinsic" evidence. In Sheldon-Seatz, Inc. v Coles, 319 Mich 401, 406-407; 29 NW2d 832 (1947), quoting Michigan Chandelier Company v Morse, 297 Mich 41; 297 NW 64 (1941), the Court said,

> We must look for the intent of the parties in the words used in the instrument. This court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.

In Upjohn Company, supra, the Court addressed whether a court may consider extrinsic evidence to demonstrate ambiguity in a qualified pollution exclusion clause. The dissent in Upjohn argued that consideration of extrinsic evidence such as policy drafting history as a means of showing ambiguity in the contract was permissible. Citing Allstate Insurance Company v Freeman, 432 Mich 657, 712; 443 NW2d 734 (1989), for the rule that "there is no need to resort to extrinsic evidence to ascertain the meaning of an insurance policy exclusion," the Upjohn majority rejected the approach suggested by the dissent and held that extrinsic evidence may not be considered to create ambiguity in a contract that is unambiguous on its face. Id at 438, fn 6. The Court of Appeals held likewise in Kent County v Home Insurance Company, 217 Mich App 250, 264; 551 NW2d 424 (1996), rejecting the plaintiff's argument that the court should consider the drafting history of a pollution exclusion clause to explain or show a "latent" ambiguity alleged to be within the clause.

Similarly, this Court has refused to look beyond the plain and ordinary meaning of a state statute to ascertain legislative intent; finding that consideration of facts beyond the four corners of a statute is permitted, "only when the statutory language is ambiguous." DiBenedetto v West Shore Hospital, 461 Mich 394, 402; 605 NW2d 300 (2000); Casco Township v Secretary of State, 261

Mich App 386, 391; 682 NW2d 546 (2004).

Our most recent history on this issue includes this Court's decision in Klapp, supra. There, the Court set out the rules of contract construction once a contract has been determined to be ambiguous, including the rule of contra proferentem. This Court found the written contract in Klapp to be ambiguous within its four corners and without reference to extrinsic evidence. In that event, a question of fact as to the contract's meaning and the parties' intent must be submitted to a jury under the rules of contract construction and in light of relevant extrinsic evidence. "In sum," this court said, "the jury can consider relevant extrinsic evidence as an aid in interpreting a contract whose language is ambiguous," with the understanding that, "... extrinsic evidence is not the best way to determine what the parties intended. Rather, the language of the parties' contract is the best way to determine what the parties intended." (at 474 and 476)

This rule is a corollary, of course, to the parole evidence rule which was summarized as follows in Schumude Oil Company v Omar Operating Company, 184 Mich App 574, 580; 458 NW2d 659 (1990):

> Parole evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.

In Klapp, this court cited Edoff v Hecht, 270 Mich 689, 695-696; 260 NW 93 (1935), to the same effect as to parole and "extrinsic" evidence as follows:

> A written instrument is open to explanation by parole or extrinsic evidence when it is expressed in short and incomplete terms, or is fairly susceptible to two constructions, or where the language employed is vague, uncertain, obscure or ambiguous. (at 470)

This logical and essential rule of contract construction is the law in numerous other states[10] and is endorsed in Couch on Insurance in conjunction with the rule that it is for the court to decide whether a contract is ambiguous.

> Whether or not a contract of insurance is ambiguous is a question of law for the court, in keeping with the general rule that the construction and effect of a written contract of insurance is a matter of law, to be determined by the court and not by the jury, where there is no occasion to resort to extrinsic evidence for the purpose of resolving an ambiguity. Further, it is only where ambiguity remains after application of the pertinent rules of construction that a fact question arises to be explained by extrinsic evidence and resolved by a jury. Couch on Insurance, 3rd ed, §21:13.
>
> If the language used is ambiguous and obscure and does not in itself disclose the intent, then resort may be had to usage, surrounding circumstances existing at the time the contract was made or other extrinsic evidence although not to subsequent circumstances. Couch on Insurance, 3rd ed, §21:15.

Finally, Michigan federal district courts have also ruled, under Michigan law, that a finding of ambiguity in a contract is a prerequisite to the admission of extrinsic evidence to determine the

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[10] Hayman Associates v Insurance Company of Pennsylvania, 231 Conn 756; 653 A 2d 122 (1994); ACL Technologies v Northbrook Property, 17 Cal App 4th 173 (1993); Bituminous Casualty Corporation v Advanced Adhesive, 73 F 3rd 335 (11th Cir 1995); Commercial Union Insurance Company v Cannelton Industries, 938 F Supp 458 (1996); River Conservancy Company, LLC v Gulf States Paper Corporation, 837 So 2d 801 (Ala 2002); Ad Two, Inc. v City and County of Denver ex rel Manager of Aviation, 9 P 3d 373 (Colo 2000); Schilberg Integrated Metals Corporation v Continental Casualty Company, 263 Conn 245; 819 A2d 773 (2003); Capital Management Company v Brown, 813 A2d 1094 (Del 2002); Campbell v Melton, 817 So 2d 69 (La 2002); American Protection Insurance Company v Acadia Insurance Company, 814 A2d 989 (Me 2003); County Commissioners of Charles County v St. Charles Associates Limited Partnership, 366 Md 426; 784 A2d 545 (2001); Stockman Bank of Montana v Potts, 311 Mont 12; 52 P3d 920 (2002); Spanish Oaks, Inc. v Hy-Vee, Inc., 265 Neb 133; 655 NW2d 390 (2003); R/S Associates v New York Job Development Authority, 98 NY 2d 29; 744 NYS 2d 358; 71 NE 2d 240 (2002); Spagnolia v Monasky, 203 ND 65; 660 NW2d 223 (2003); Fowler v Lincoln County Conservation District, 2000 OK 96; 15 P 3d 502 (2000); Dixon v Pro Image, Inc., 1999 UT 89; 987 P 2d 48 (1999); Rehnberg v Hirschberg, 203 Wyo 21; 64 P 3d 115 (2003); United States Fidelity and Guarantee Corporation v Elba Wood Products, Inc., 337 S 2d 1305 (Ala 1976); McIntyre v Guild, Inc., 105 Md App 332; 659 A 2d 398 (1995); Cherry v Anthony, Gibbs, Sage, 501 So 2d 416 (Miss 1987); Shifrin v Forrest City Enterprises, Inc., 64 Ohio St 3d 635; 597 NE 2d 499 (1992); Arnold v Cantini, 154 Vt 142; 573 A 2d 1193 (1990)

meaning of a contract. In Aetna Casualty and Surety Company v Dow Chemical Company, 28 F Supp 2d 440, 444 (ED Mich 1998), and Clark Brothers Sales Company v Dana Corporation, 77 F Supp 2d 837, 843 (ED Mich 1999), the courts held that, if a contract is unambiguous, the court must enforce the contract as written, without looking to extrinsic evidence.

B. THE ABSOLUTE POLLUTION EXCLUSION IS NOT AMBIGUOUS AND MUST BE APPLIED AS WRITTEN

The pollution exclusion clause is not ambiguous. The Park has never specified a reasonable interpretation for any phrase, term or word within the exclusion other than the plain, ordinary and common meaning of the words of the exclusion. Nor, did the Court of Appeal's majority find ambiguity within the clause before consideration of the extrinsic fact that the Pool had covered basement back-up claims for the Park. In an apparent afterthought, the lower court majority detected potential ambiguity in the exclusion because "the contract does not define 'pollution' or 'waste' as including waste water, sewer water, or combined sewer flow." (Majority, p7, fn9, Apx 34a) The Court of Appeals did so in disregard of applicable rules of contract construction. In the first instance, the Court of Appeals ignored the plain and common meaning of the words within the exclusion. Second, the lower court majority failed to acknowledge and apply the rule that the absence of a definition of a word that has a common meaning does not create ambiguity within a contract, and resort to a dictionary definition to determine the plain, ordinary or common meaning of a word is appropriate. Group Insurance Company v Czopek, supra at 596; Stanton v City of Battle Creek, supra, at 617.

As demonstrated above, there is no ambiguity in the language and words within the clause. Accepting the common meaning of the word "contaminant," it is clear that combined sewage is a pollutant. The substance discharged into Fox Creek contained numerous solids and liquids that

contaminated the Creek upon contact. This solid and liquid contaminant included the enumerated solids, urine, E-coli bacteria, and the substances washed down surface street drains such as oil and gasoline. Furthermore, the pollution exclusion clause includes "waste" within the definition of contaminant. There is no doubt the enumerated solids, human body waste, and the liquid that goes down kitchen sinks, bathtubs and shower drains are universally recognized as "waste." Dictionary definitions only confirm these common meanings of the words "contaminant" and "waste." Moreover, the exclusion applies to "any" liquid or solid contaminant. That is, all contaminants are included within the scope of the exclusion, without limitation or qualification. Hence, this pollution exclusion has been identified as the "absolute" pollution exclusion in Michigan. McGuirk, supra, at 351.

The McGuirk court addressed the exclusion's application to damage arising from the release of water contaminated by petroleum and considered what other courts have said about the clarity of the clause. "Most courts that have examined similar exclusions," the court said, "have concluded that they are clear and unambiguous and are just what they purport to be -- absolute." (Citations admitted) (at 351). Consistent with this weight of authority and finding no ambiguity within the words of the exclusion, the court in McGuirk found the exclusion to be "clear and unambiguous." (at 354.)

The Court of Appeals again considered an absolute pollution exclusion in McKusick v Travellers Indemnity, 246 Mich App 329; 632 NW2d 525 (2001). The underlying claims in McKusick were product liability claims filed by two workers injured by the failure of a high-pressure hose used to carry a highly toxic substance. The insured employer sought full coverage from its insurer, arguing that the pollution exclusion clause only applied to claims arising from traditional

forms of environmental pollution. Properly, though, and following the applicable rules of contract construction, the McKusick court refused to "judicially engraft" such a limitation on the pollution exclusion clause because "there are no limitations" within the clause "regarding its scope." The court specifically recognized that it was not permitted to "rewrite an insurance policy under the guise of interpretation" and could not "create an ambiguity where none exists." On that basis, the court found the clause to be unambiguous. (at 338.)

Other Michigan courts have also found the absolute pollution exclusion clause to be clear and unambiguous. Bituminous Casualty Corporation v RJ Taylor Corporation, No. 96-009544-CK (Mich App, May 8, 1998) (unpublished) (Exhibit 5); Hydrodynamics, supra, (unpublished) (Exhibit 1); Gulf Insurance Company v City of Holland, No. 1-98-CV-774 (WD Mich, April 3, 2000) (unpublished) (Exhibit 6); Bithell, supra; City of Westland, supra, (unpublished) (Exhibit 2); City of Warren, supra, (ED Mich 2001); City of Warren, supra, (6th Cir 2003) (unpublished) (Exhibit 4); Village of Nashville v Michigan Township Participating Plan, No. 224598 (Mich App, August 3, 2001) (unpublished) (Exhibit 7). The majority of other states agree that this exclusion or similar absolute pollution exclusions are clear and unambiguous and must be applied as such.[11]

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[11] See e.g., Peace v Northwestern Mut Ins Co., 228 Wis 2d 106; 596 NW 2d 429 (1999); Madison Constr Co v The Harleysville Mut Ins Co, 557 Pa 595, 735 A2d 100 (1999); Deni Associates of Florida, Inc v State Farm Fire & Cas Ins Co, 711 So2d 1135 (Fla 1998); SD State Cement Plant Comm v Wausau Underwriters Ins Co, 616 NW2d 397, 409 (SD 2000); National Union Fire Ins Co v CBI Indus, Inc, 907 SW2d 517, 520-22 (Tex 1995) (per curiam), *reversing* 860 SW2d 662 (Tex Ct App 1993); Dryden Oil Co v Travelers Indem Co, 91 F3d 278, 283-84 (1st Cir 1996) (Massachusetts law); Western World Ins Co v Stack Oil, Inc, 922 F2d 118 (2d Cir 1990); Reliance Ins Co v Moessner, 121 F3d 895 (3rd Cir 1997) (Pennsylvania law); National Electrical Mfgs Ass'n v Gulf Underwriters Ins Co, 162 F3d 821 (4th Cir 1998) (District of Columbia law); American States Ins Co v Nethery, 79 F3d 473 (5th Cir 1996) (Mississippi law); Park-Ohio Indus Inc v Home Indem Co, 975 F2d 1215, 1222 (6th Cir 1992) (Ohio Law); Pipefitters Welfare Educ Fund v Westchester Fire Ins Co, 976 F2d 1037, 1042 (7th Cir 1992); Royal Ins Co of America v Kirksville
(continued on next page)

ARGUMENT III

BECAUSE THE POOL TIMELY RESERVED ITS RIGHT TO DENY INDEMNIFICATION COVERAGE AND BECAUSE THE PARK FAILED TO PRESENT ANY EVIDENCE OF RELIANCE AND PREJUDICE, THE POOL MAY NOT BE ESTOPPED FROM ASSERTING THE POLLUTION EXCLUSION CLAUSE

The ruling that the Pool may be estopped from asserting the pollution exclusion clause after the Pool cited the exclusion, among other exclusions, in a timely reservation of rights, is erroneous for three reasons. It is contrary to controlling precedent. Further, for coverage by estoppel to apply, the insured must prove that it justifiably relied on action taken by the insurer and suffered detriment as a result. In the context of a motion for summary disposition, as in this case, the insured must present "specific" evidence on these elements of the claim. The Park failed to do so. Hence, the Park's estoppel claim fails, as a matter of fact. Lastly, an insurer's coverage of other claims does not constitute "waiver" or create an estoppel.

A. A TIMELY RESERVATION OF RIGHTS PREEMPTS ESTOPPEL

It can fairly be said that the beginning and end of all Michigan case law on estoppel in the insurance setting is the rule that this equitable theory may not be used to broaden the coverage of a

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(continued from previous page)
College of Osteopathic, 191 F3d 959 (8th Cir 1999) (Missouri law); Bituminous Cas Corp v St. Clair Lime Co, 69 F3d 547 (10th Cir 1995) (Oklahoma law); Technical Coating Applicators, Inc v US Fidelity and Guar Co, 157 F3d 843 (11th Cir 1998) (Florida law); Shalimar Contractors, Inc v American States Ins Co, 975 F Supp 1450 (MD Ala 1997), *aff'd mem*, 158 F3d 588 (11th Cir 1998); Union Mut Fir Ins Co v Hatch, 835 F Supp 59, 64-67 (DNH 1993); Alcolac v California Union Ins Co, 716 F Supp 1546, 1549 (D Md 1989); Nunn v Franklin Mut Ins Co, 274 NJ Super 543, 547-48, 644 A2d 111, 113 (App Div 1994); American States Ins Co v Skrobis Painting & Decorating, Inc, 182 Wis 2d 445, 455-56, 513 NW2d 695, 699 (Wis Ct App), review denied, 520 NW2d 88 (Wis 1994); League of Minnesota Cities Ins Trust v City of Coon Rapids, 446 NW2d 419 (Minn Ct App 1989), review denied (Minn Dec 15, 1989); A-One Oil, Inc v Massachusetts Bay Ins Co, 250 A.D2d 633, 634, 672 NYS2d 423, 424 (2d Dep't) *appeal denied*, 92 NY2d 814, 705 NE2d 1215, 683 NYS2d 174 (1998).

policy, such that it would "cover a loss it never covered by its terms ... and create a liability contrary to the express provisions of the contract the parties did make." Ruddock v Detroit Life Insurance Company, 209 Mich 638; 117 NW 242 (1920). This rule, however, is not without narrow and well-defined exceptions. These exceptions were placed into two "classes" of cases in Lee v Evergreen Regency Cooperative, 151 Mich App 281; 390 NW2d 183 (1986). "The cases decided since Ruddock, which have allowed estoppel or waiver to bring within coverage a risk not covered by the policy terms or expressly excluded from the policy fall into two broad classes." Id at 286. The first class of cases, which has no applicability here, includes those in which an insurer has rejected a claim and refused to defend its insured in underlying litigation. In such a case, the insurer may not later raise issues that were or should have been raised in the underlying suit. The Lee court identified Morrill v Gallagher, 370 Mich 578; 122 NW2d 687 (1963), and Dickenson v Homerich, 248 Mich 638; 227 NW 696 (1929), as examples.

The second class of cases where estoppel may expand coverage beyond the terms of a policy are those "where the inequity of forcing the insurer to pay on a risk for which it never collected premiums is outweighed by the inequity suffered by the insured because of the company's actions." Lee at 287. The Court of Appeals' majority has placed this case in this class of cases. The majority's analysis and reasoning however, is fatally incomplete. As the court said in both Lee and Smit v State Farm Insurance Company, 207 Mich App 674; 525 NW2d 528 (1994), this second class of exceptions to the rule of Ruddock consists of two very specific and narrow types of insurance coverage cases, neither of which apply to the Pool and each of which were ignored by the Court of Appeals.

First, coverage by estoppel may be permitted in cases "in which the insurance company has

misrepresented the terms of the policy to the insured." Lee at 287; Smit at 683. This class includes Industro Motive Corporation v Morris Agency, Inc., 76 Mich App 390; 256 NW2d 607 (1977), and Parmet Homes, Inc. v Republic Insurance Company, 111 Mich App 140; 314 NW2d 453 (1981). As the Smit court explained, the insured in Industro acted in reliance on the insurer's misrepresentation about the terms of the policy "before the loss." Industro and Parmet each involve a company or agent taking action, before the loss, that led the insured to believe he was covered when he was not. Cases of forfeiture, lapse, or cancellation for non-payment of a premium, where the insured is led to believe a policy is in place because, for example, a premium payment has been accepted or a notice from the company was confusing, also belong in this category of cases. These include, for example, Staffan v Cigar Maker's International, 204 Mich 1; 169 NW 876 (1918); Rorick v State Mutual Rodded Fire Insurance Company, 263 Mich 169; 248 NW 584 (1933); Pastucha v Roth, 290 Mich 1; 287 NW 355 (1939); Kaminskas v Lipnianski, 51 Mich App 40; 214 NW2d 331 (1973); Allstate Insurance Company v Snarski, 174 Mich App 148; 435 NW2d 408 (1988); Morales v Auto Owners Insurance Company, 458 Mich 288; 582 NW2d 776 (1998). In each case, the company or the insurance agent was estopped from denying the existence of the policy based on misrepresentations or actions upon which the insured relied before the loss was suffered.[12]

The second and last type of estoppel case in Michigan is one in which the insurance company has "defended the insured without reserving the right to deny coverage." Lee at 287; and Smit at 683. In Michigan, there are very few such cases. They include Fidelity and Casualty Company of New York v Board of County Road Commissioners, 267 Mich 193; 255 NW 284 (1934); Meirthew

[12] The Park has never made such a claim. Rather, it claims to have been misled by the Pool's actions after the policy was in place.

v Last, 376 Mich 33; 135 NW2d 353 (1965); Multi-States Transport, Inc. v Michigan Mutual Insurance Company, 154 Mich App 549; 398 NW2d 462 (1986); Cozzens v Bazzani Building Company v Westchester Fire Insurance Company, 456 F Supp 192 (ED Mich 1978). In each of these cases, the company defended the insured without reserving the right to deny indemnification or delayed as much as twenty-two, twenty-four or twenty-nine months before providing a reservation notice to the insured. Meirthew had the added element of a conflict of interest because defense counsel in underlying litigation represented both the insured and the insurance company at various times in the proceedings.

On the other hand, estoppel has been asserted many times in Michigan where a defense has been provided to the insured under a reservation of rights. Yet, in every case, the Court of Appeals or this Court has refused to apply estoppel under such circumstances. These cases include, Kidd v Minnesota Atlantic Transit Company, 261 Mich 31; 245 NW 561 (1932); Sargent Manufacturing Company v Traveler's Insurance Company, 165 Mich 87; 130 NW 211 (1911); City of Three Rivers v Grunert, 292 Mich 228; 290 NW 390 (1940); Security Insurance Company v Daniels, 70 Mich App 100; 245 NW2d 418 (1976), (declaratory judgment action is suitable alternative to a reservation of rights letter); Lee v Evergreen Regency Cooperative, supra; Fire Insurance Exchange v Fox, 167 Mich App 710; 423 NW2d 325 (1988); Allstate v Keillor, 203 Mich App 36; 511 NW2d 702 (1993); First Mercury Syndicate, Inc. v Telephone Alarm Systems, Inc., 849 F Supp 559 (WD Mich 1994); Smit v State Farm Insurance Company, supra; Kirschner v Process Design Associates, Inc., 459 Mich 587; 592 NW2d 707 (1999); Lansing Board of Water and Light v Deerfield Insurance Company, 183 F Supp 2d 979 (WD Mich 2002).

Equitable estoppel, generally and in the insurance context, requires justifiable reliance and

prejudice to the insured. Morales v Auto Owners Insurance Company, supra and Lee v Evergreen Regency Cooperation, supra. When an insured defends under a clear and timely reservation of rights, it is impossible for these elements of estoppel to be present. The 1911 Sargent case, supra, is particularly informative on Michigan's long recognition of the practical and legal significance of a clear and timely reservation of rights. The Sargent court drew the distinction between a case in which the insured is not properly notified of a reservation of rights and a case in which a reservation is timely. In the former case, if the insured alters his management of the underlying case because he has not been properly notified of a reservation of rights, an estoppel may be created. However, when the insurer defends and provides notice that it is reserving its rights under the policy, an insured's claim that he managed the case differently, as the Park has claimed here, is rejected. With seasonable advice from the insurer, the Sargent court found that the insured has "ample opportunity" to "control the litigation" or "to make a settlement of the claim" and estoppel did not apply. Id at 93-94. As succinctly put in City of Carter Lake v Aetna Casualty & Surety Company, 604 F 2d 1052, 1062 (8th Cir 1979):

> ... reservation of rights is a means by which prior to determination of the liability of the insured, the insurer seeks to suspend the operation of waiver and estoppel.

More recently, the rule has been stated as a priori by this Court. In Kirschner, supra, this Court considered whether an insurer might be estopped from denying coverage because it had not notified the plaintiff in underlying litigation of the company's reservation of rights. In declining to impose such a rule, this Court specifically tied estoppel to an insurer's failure to provide a timely reservation of its rights: "When an insurance company undertakes the defense of its insured, it has a duty to give reasonable notice to the insured that it is proceeding under a reservation of rights, or the insurance company will be estopped from denying its liability." Id at 593. Because the insurer in

Kirschner had provided timely notice to the insured that it was reserving its rights, this Court found it "apparent" the insured was not "prejudiced" by a lack of notice. Id at 596.

Likewise, in Keillor, supra, the insured filed an answer on his own in underlying litigation and Allstate provided a reservation of rights letter two months later, citing two policy exclusions. Five months later, Allstate filed a complaint for declaratory judgment on the issue of coverage and soon raised a third policy exclusion in the course of the declaratory judgment case. The case reached this Court on other issues but this Court did remand the case to the Court of Appeals on the issue of estoppel, among other issues. In doing so, the Court said that "an insurer is subject to the defenses of waiver and estoppel if it defends without first reserving its right to later assert its policy defenses." Allstate Insurance Company v Hayes, 442 Mich 56, 59, fn 3; 499 NW2d 743 (1993) (citing Meirthew v Last, supra). On remand in the Court of Appeals, under the case name Allstate Insurance Company v Keillor, supra, the estoppel defense was considered and rejected by the court because "this is not a situation where Allstate defended the action without reserving its right to later assert its exclusions." (at 39) Additionally, the court found, because there was no "unreasonable delay" by Allstate in asserting its exclusions, Keillor "has suffered no prejudice." For this reason, estoppel did not apply. In support of this ruling the Keillor court cited First Insurance Exchange, supra, and Security Insurance Company of Hartford, supra; cases in which estoppel did not lie because the insurer had timely reserved its rights (Fire Insurance Exchange) or had timely filed an action for declaratory judgment on the issue of coverage. (Security Insurance Company of Hartford).

B. ESTOPPEL DOES NOT APPLY, AS A MATTER OF FACT, BECAUSE THE PARK FAILED TO PRESENT ANY EVIDENCE ON JUSTIFIABLE RELIANCE AND PREJUDICE

Both the trial court and the Court of Appeals compounded their legal error on estoppel by

failing to dismiss the claim under MCR 2.116(C)(10), as they were bound to do under the court rule. The trial court and the Court of Appeals found questions of fact on the elements of estoppel without any evidentiary support for this finding of fact in the trial court record. Rather, the facts found in the lower courts on estoppel were taken directly from the written arguments made by the Park's attorneys without one scintilla of evidentiary support in the record. The Park's lawyers argued in the lower courts that the Pool's payment of backup claims and actions taken by the Pool in its handling of the Etheridge litigation led the Park to believe that coverage would be afforded in Etheridge and the Park suffered detriment as a result. Yet, in making findings on these claims, the Court of Appeals simply quoted written argument to this effect made by the Park in trial court and Court of Appeal's briefs. For example, the Court of Appeals quoted from Park briefs as follows:

> ... the Park has been prejudiced by its reliance that coverage would be afforded in the Etheridge suit. The simple fact that the Park handled the lawsuit under the Pool's misleading and ambiguous statements regarding insurance coverage certainly affected the Park's management of the case. Because he believed insurance coverage would be forthcoming, City Attorney, Deason only concerned himself with issues related to the injunctive relief, which would not be covered by insurance. Discovery and settlement discussions would have been conducted differently if the Park knew up front that the Pool would decline the same type of coverage it had consistently provided in the past. Additionally, the Park would have taken different steps to financially prepare for an adverse judgment if it would have known that coverage would be denied.
>
> The Park never thought that the pollution exclusion claims [sic] in its insurance policies would be applied to the Etheridge case because the pollution exclusion clause had not been enforced when previous CSF claims had been submitted to the Pool by the Park." (Majority, p 9, Apx 36a)

In point of fact, not one Park witness identified "the Pool's misleading and ambiguous statements regarding insurance coverage" that affected the Park's management of Etheridge. The Park's City Attorney, Harold Deason, did not testify that he ever "believed insurance coverage would be forthcoming." The Park did not present any evidence, any evidence at all, in support of the

assertion "that discovery and settlement discussions" in Etheridge "would have been conducted differently," but for something done or said by the Pool. The Park offered no testimony from a Park representative to show that the Park "would have taken different steps to financially prepare for an adverse judgment" in Etheridge, had the Park known that coverage would be denied. The Park did not present one witness to show that any representative of the Park ever "thought" the pollution exclusion clause would not be applied to the Etheridge claims by the Pool. In short, the Park did not present any evidence cognizable under MCR 2.116 (C)(10) on the critical elements of estoppel -- justifiable reliance and prejudice. Not one witness testified that the Pool's actions led the Park to believe the Pool would not rely on the pollution exclusion in Etheridge. Given the absence of evidence on reliance, the Park was obviously unable to present evidentiary proof on the element of prejudice.

The only witness on any element of estoppel even cited by the Park in its written arguments was City Attorney, Harold Deason. As seen from that portion of Park argument quoted by the Court of Appeals above, the Park argued that Mr. Deason only concerned himself with injunctive relief in the underlying litigation "because he believed insurance coverage would be forthcoming." However, the Park did not cite any testimony to this effect. In fact, Mr. Deason did not so testify and his deposition testimony is devastating to the Park's estoppel claim. Deason testified that, as late as July 24, 1997, at the very end of the Etheridge case, he did not know if he had "formed a specific conclusion at that time" whether the Pool was relying on its reservation of rights. Still, the Park argues that its management of Etheridge, which began in September 1995, was altered based on such a belief. Yet, Mr. Deason, who monitored and managed the Etheridge case for the Park, had not formed a specific conclusion on the matter as late as July 1997, and, therefore, by its own testimony,

the Park had no basis for altering its management of the underlying case from September 1995 to July 1997. (Deason, pp 120-121, Apx 556a)

The balance of the record is equally devastating to the Park's argument on estoppel. See, for example, Mr. Deason's testimony that, upon receipt of the Pool's reservation of rights letter, he went to the Pool and asked that the letter be withdrawn. He was told that the letter would not be withdrawn. (Deason Deposition, p101-106, Apx 551a – 552a) See also, the adjustor's Memo showing that, just prior to the Park's settlement of Etheridge, the Pool's adjustor on the case reminded the City Manager that the reservation of rights letter remained in effect. (8/11/97, Adjustor's Memo to File, Apx 912a – 914a) See also the testimony of the Park's City Manager to the effect that, prior to the Park's independent settlement of the Etheridge case, he did not expect the Park to provide full indemnification coverage on the claim. (Krajniak Deposition, pp154, 171 & 192, Apx 467a, 469a and 473a) These and other facts contrary to the Park's claims of reliance and prejudice appear in the Etheridge Case Chronology attached to this brief. This chronology includes testimony from key Park representatives as to what they knew and believed at all critical stages of the Etheridge litigation and demonstrates that the Park's claims of reliance and prejudice are nothing more than argument with absolutely no support in the record.

Yet, the trial court and the Court of Appeals' majority adopted these arguments whole cloth, in stark violation of the rules and standards applicable to motions for summary disposition. Under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties. See MCR 2.116(G)(5). The trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show there is no genuine issue with respect to a material fact, and the

moving party is entitled to judgment as a matter of law. Likewise, in response to such a motion "evidentiary proofs" of the same type are "required." Smith v Globe Life Insurance Company, 460 Mich 446, 454-455 and fn 2; 597 NW2d 28 (1999). General allegations, notice pleading, matters upon information and belief, and alleged common knowledge are not enough. The moving party must come forward with some evidentiary proof, some statement of specific fact upon which to base their case. If they fail, the motion for summary disposition is properly granted or denied. Skinner v Square D Company, 445 Mich 153, 160-161; 516 NW2d 475 (1994) and Durant v Stahlin, 375 Mich 628, 640; 135 NW2d 392 (1965).

The parties in this case filed cross-motions for summary disposition based on the pollution exclusion clause. The Pool asserted the exclusion was applicable for both legal and factual reasons, with facts well supported in the record. In addition to its legal argument on the primacy of a reservation of rights, the Pool's motion and response to the Park's cross-motion were supported by the facts surrounding the Pool's payment of other claims and the evidence in the Etheridge Case Chronology to this brief, showing precisely how the Pool handled the Etheridge claim and that the Park was never misled by any action of the Pool. The Park responded with argument only, not based on evidentiary proof or specific facts in the record, as required. Rather, the arguments made by the Park on the elements of estoppel were just that – "arguments." Therefore, the trial court ruling on estoppel and the Court of Appeals' order that this case be remanded to the trial court on the issue of estoppel were directly contrary to the applicable court rule and controlling precedent and, for this

reason alone, must be reversed.[13]

C. THE PAYMENT OF OTHER CLAIMS DOES NOT CONSTITUTE WAIVER OR CREATE ESTOPPEL

The law provides that payment of prior claims does not constitute a waiver of a policy of insurance or create an estoppel. See FDIC v Duffy, 47 F 3d 146, 150 (5th Cir 1995), where the court, relying in part on a state statute, held that "conduct in paying one claim under a policy does not prevent an insurer from raising defenses to the policy." See also, Martinelli v The Traveler's Insurance Companies, 687 A 2d 443 (1996) (no estoppel based on payment of a prior claim as the insurer could have paid the prior claims "for any number of reasons, including mistake."); Browder v Aetna Life Insurance Company, 126 Ga App 140; 190 SE2d 110 (1972) (payment of a similar claim (ten years earlier) was not to be relied upon as a blanket waiver of all future claims); and, Globe Insurance Company v Atlantic Shipping Company, 51 Ga App 904, 908; 181 SE 310 (1935) (payment of one claim did not estop the insurer from asserting that another claim arising from the same occurrence was not covered.) This rule is recognized in Michigan. As Judge O'Connell said in dissent, the payment of benefits on a claim does "not render inequitable the later assertion of a policy exclusion against the claim," citing Calhoun v Auto Club Insurance Association, 177 Mich App 85; 441 NW2d 54 (1989), citing Hammermeister v Riverside Insurance Company, 116 Mich App 552,

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[13] Note also, that the parties' contract contains an anti-waiver and modification provision. The coverage document provides that, "this contract's terms can be amended or waived only by endorsement issued by us [the Pool] and made a part of this contract." (Coverage document, p 31 of 47, Apx 325a) The essence of the lower courts' estoppel ruling is that the Pool has somehow waived or, by course of conduct, amended the pollution exclusion clause. This cannot occur without the written endorsement of the Pool or "clear and convincing" evidence showing the Pool to have waived both the exclusion and the anti-waiver and modification provisions of the coverage document. Quality Products & Concepts Corporation v Nagel Promotions, Inc., 469 Mich 362; 660 NW2d 251 (2004).

claims does not operate as a waiver of the pollution exclusion clause. In this case, both the parties' contract and the common law prevent that from occurring and the lower court majority's ruling otherwise is directly contrary to this precedent.

RELIEF REQUESTED

Wherefore, the Michigan Municipal Liability & Property Pool respectfully requests that this Court find that combined sewage is a pollutant under the absolute pollution exclusion clause, and rule that extrinsic evidence may not be used to establish ambiguity in the parties' contract and that coverage by estoppel does not lie for the reasons stated in this brief, and grant it such other relief as is warranted in law and equity.

Respectfully submitted and prepared by,

PEAR SPERLING EGGAN & DANIELS, P.C.

DATED: January 7, 2005

BY: _____

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STATE OF MICHIGAN

IN THE SUPREME COURT

CITY OF GROSSE POINTE PARK, MICHIGAN,

Plaintiff-Appellee,

S.C. No. 125630
C.A. No. 228347
L.C. No. 98-806998-CK

vs.

MICHIGAN MUNICIPAL LIABILITY AND PROPERTY POOL,

Defendant-Appellant.

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss.
COUNTY OF WASHTENAW)

Thomas E. Daniels, being first duly sworn, deposes and says that on the 7th day of January, 2005, he served copies of *Michigan Municipal Liability and Property Pool's Brief On Appeal* and *Proof of Service* upon:

1. R. Craig Hupp, BODMAN, LONGLEY & DAHLING LLP, (two copies) 100 Renaissance Center, 34th Floor, Detroit, MI 48243, ~~by~~ **first class mail**.

2. Michigan Supreme Court, Hall of Justice, 925 W. Ottawa, Lansing, MI 48909, **by personal service.**

Thomas E. Daniels

Subscribed and sworn to before me this 7th day of January 2005.

Suzanne L. Stechschulte, Notary Public
Wayne County, Michigan
Acting in Washtenaw County, Michigan
My Commission Expires: May, 20, 2008

H
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

HYDRODYNAMICS, INC., Plaintiff-Appellant,
v.
AUTO-OWNERS INSURANCE CO., Defendant-Appellee.

No. 193389.

July 11, 1997.

Before: MICHAEL J. KELLY, P.J., and WAHLS and GAGE, JJ.

PER CURIAM.

*1 In this declaratory action to determine defendant's duty under an insurance policy to defend plaintiff in a lawsuit, plaintiff appeals as of right from an order granting defendant summary disposition pursuant to MCR 2.116(I). We affirm.

We review a motion for summary disposition under MCR 2.116(I) de novo to determine whether the pleadings show that a party was entitled to judgment as a matter of law or whether affidavits or other documentary evidence showed that no genuine issue of material fact existed. *Asher v. Exxon Co, USA*, 200 Mich.App 635, 638; 504 NW2d 728 (1993).

Plaintiff's insurance policy with defendant included a pollution exclusion clause that excluded coverage for "[b]odily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants." The circuit court held that sewage constituted a pollutant for purposes of this clause. On appeal, plaintiff argues that this holding was in error and points to the definition of sewage contained in the underlying complaint, which states:

> Sewage means urine, feces, blood, other human bodily fluids, toxins, bacteria including e coli, microbes, viruses including hepatitis, HIV and other AIDS viruses, pathogens, carcinogens, disease organisms, disease carrying organisms, spores, chemicals, fertilizers[,] other elements of sewage, combined sewage overflow, groundwater, rainwater, debris, sewer gases, vapors and odors, liquids and solids, sewer influent of every kind and nature and/or any other gases, liquids and solids and components of sewage which may have been contained in the solutions which backed up or came into the homes of the Plaintiffs. Sewage includes these solutions whether fully treated, partially treated or untreated.

Plaintiff contends that because the complaint's definition of sewage includes groundwater and rainwater, which are not necessarily pollutants, the lower court erred in granting summary disposition because defendants owed a duty to defend against the claims until the exact nature of the damages to the complainants' residences could be determined. *American Bumper and Mfg Co v. Hartford Ins Co*, 207 Mich.App 60, 66; 523 NW2d 841 (1994). We disagree.

In the context of a pollution case, the parameters of the duty of an insurance company to defend its insureds from the claims of third parties are defined by the allegations in the complaint of the third party against the insured. *Protective Nat Ins Co of Omaha v. City of Woodhaven*, 438 Mich. 154, 159; 476 NW2d 374 (1991). However, this Court has held that the duty to defend is not based solely on the terminology used in the pleadings. *State Farm Fire and Casualty Co v Basham*, 206 Mich.App 240, 242; 520 NW2d 713 (1994). Rather, a court must focus on the cause of the injury to determine whether coverage exists. *Id.*

Here, although the underlying complaint included groundwater and rainwater as components of its definition of sewage, it is clear from the face of the complaint that none of the damage alleged was caused by groundwater or rainwater alone. The complaint refers to the failing of the "influent pumps" causing rain to accumulate with sewage that backed up into the complainants' homes. Groundwater and rainwater, when mixed with effluent from sanitary sewers, is considered a pollutant. See *Black Marsh Drainage Dist v. Rowe*, 350 Mich. 470, 477; 87 NW2d 65 (1957).

*2 Because there is no issue of material fact that the

EXHIBIT 1

sewage back-up causing damage to the underlying complainants' basements was a mixture of rainwater, groundwater and other pollutants, the trial court did not err in granting defendant's motion for summary disposition on the basis that the pollution exclusion clause negated defendant's duty to defend the claims made against plaintiff.

Affirmed.

Judge KELLY did not participate.

1997 WL 33344492 (Mich.App.)

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY and City of Westland, Plaintiffs-Appellees,
v.
SEABOARD SURETY COMPANY, Defendant-Appellant,
and
FEDERAL INSURANCE COMPANY, Defendant.

No. 235310.

Aug. 7, 2003.

Before: MARKEY, P.J., and CAVANAGH and HOEKSTRA, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 In this insurance coverage action, defendant Seaboard Surety Company [FN1] appeals as of right from a judgment in favor of plaintiffs Michigan Municipal Risk Management Authority (MMRMA) and the City of Westland (Westland) in the amount of $689,138.96. We reverse and remand.

FN1. Defendant Federal Insurance Company is not a party to this appeal. Therefore, our use of the singular "defendant" refers to Seaboard Surety Company.

This case arose when the basements of several hundred Westland homes were flooded, allegedly caused by the negligent installation of a bulkhead by contractors hired to separate Westland's storm drain and sewage drain systems. Before the start of the multi-phase project, Westland had obtained an owners and contractors protective liability insurance policy through defendant. The homeowners sued the contractors allegedly liable, and a settlement fund was created to provide recovery for all the injured homeowners. While other insurance companies contributed to the fund, defendant did not. Plaintiffs sought a judgment providing that defendant had a duty to defend and indemnify Westland, providing for Westland's emergency response costs, and awarding plaintiffs costs, expenses and attorney fees. Having heard cross-motions for summary disposition pursuant to MCR 2.116(C)(10), the trial court granted summary disposition on the coverage issue in favor of plaintiffs, stating in part:

> Here there is no doubt that the coverage provisions of the policy specifically include damage resulting from "operations of designated contractor." There is no doubt that Lanzo was the designated contractor, and that the "description of the operations" was sewer and paving work. It is also undisputed that in the underlying action, plaintiff sought to hold the City of Westland responsible for basement flooding allegedly resulting from the acts of Lanzo, including but not limited to the blockage of a line. Thus, the coverage portion of the policy specifically contemplates coverage for a very specific activity, one of the major risks of which is release of sewer contents. The court agrees with defendant that certainly a sewer contractor could take other action which would trigger coverage, but it cannot seriously be disputed that when a sewer contractor is performing sewer and paving work on an existing sewer, one of the major sources of potential liability involves release of the contents of the sewer. Thus, the policy expressly provides coverage for a certain construction activity in the declaration, but according to defendant, excludes it under the general pollution exclusion. The court finds that this creates an ambiguity in the policy, which of course, did not exist in *McGuirk* [*Sand & Gravel, Inc v. Meridian Mut Ins Co*, 220 Mich.App 347; 559 NW2d 93 (1996)], which did not concern this type of policy.

Proceedings with respect to damages followed. Ultimately, the trial court entered a final order in favor of plaintiffs in the amount of $689,138.96. This appeal ensued.

On appeal, defendant first argues that the trial court erred in finding coverage under the policy. Specifically, defendant claims that the trial court improperly refused to apply the absolute pollution

EXHIBIT 2

exclusion in the insurance policy. Defendant contends that contrary to the trial court's holding, the existence of exclusions does not in itself create an ambiguity because they are meant to limit the scope of insurance coverage. Defendant further contends that the trial court improperly relied on the insured's "reasonable expectations" of coverage despite the unambiguous language of the policy.

*2 We review a trial court's grant of summary disposition de novo. *Spiek v. Dep't of Transportation*, 456 Mich. 331, 337; 572 NW2d 201 (1998). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden v. Rozwood*, 461 Mich. 109, 120; 597 NW2d 817 (1999). Further, whether insurance policy language is clear and unambiguous is a question of law reviewed de novo. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich. 558, 563; 596 NW2d 915 (1999). When interpreting an insurance policy, the court must read the policy as a whole and give meaning to all terms. *Auto-Owners Ins Co v. Churchman*, 440 Mich. 560, 566; 489 NW2d 431 (1992). If the policy fairly admits of only one interpretation, it is unambiguous. *Matakas v. Citizens Mut Ins Co*, 202 Mich.App 642, 650; 509 NW2d 898 (1993). A clear and unambiguous policy must be enforced as written. *Henderson v State Farm Fire & Casualty Co*, 460 Mich. 348, 354; 596 NW2d 190 (1999). With respect to exclusionary clauses, in *Churchman, supra* at 567, our Supreme Court stated:

> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume. [Citations omitted.]

In the present case, the insurance policy states that defendant "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." However, under the "exclusions" section, the policy does not apply to

> j. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
> (a) At or from premises you own, rent, or occupy;
> (b) At or from any site or location used by or for you or others for handling, storage, disposal, processing or treatment of waste;
> (c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or
> (d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:
> (i) if the pollutants are brought on or to the site or location in connection with such operations; or
> (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.
> (2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.
> *3 Pollutants mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

In *McGuirk Sand & Gravel, Inc v. Meridian Mut Ins Co*, 220 Mich.App 347, 353-354, 357; 559 NW2d 93 (1996), this Court analyzed an absolute pollution exclusion and held, consonant with the vast majority of courts, that it was clear and unambiguous, and thus precluded coverage. The language in the absolute pollution exclusion quoted in the *McGuirk* decision is identical to portions of the pollution exclusion in the present case. See also *McKusick v. Travelers Indemnity Co*, 246 Mich.App 329, 333; 632 NW2d 525 (2001) ("The absolute pollution exclusion has been interpreted by this Court, as well as many other jurisdictions, to be clear and unambiguous in precluding coverage for claims arising from pollution .")

Here, although the flooding problem is perhaps a foreseeable situation when undertaking a sewer and paving project, the contract language, and specifically the exclusion language, are clear and unambiguous. Excluded from coverage are "bodily injury" or "property damage" resulting from the discharge of pollutants from city-owned or occupied property that is used to transport, handle, or store waste. We respectfully disagree with the trial court's conclusion that excluding a major source of potential liability from generally broad coverage creates an ambiguity in the contract even when that source of potential liability may be likely to occur in light of

the nature of the activity undertaken. Rather, where the contract language is unambiguous, the exclusion merely places limitations on the otherwise broad coverage. Further, plaintiffs cannot make a credible claim that the pollution exclusion rendered coverage under the policy illusory because the policy provided coverage for many risks associated with this type of construction project other than those involving pollution.

To the extent that plaintiffs argue that the pollution exclusion does not apply to the present case because defendants failed to offer evidence indicating the homeowners' homes were flooded by a pollutant, we find their argument without merit. The policy's pollution exclusion covers the *alleged* discharge of pollutants, and the underlying complaints, which defendant attached to their motion for summary disposition, clearly alleged that the flooding consisted of pollutants. For example, the underlying complaints contained allegations describing the flooding as "sewage, pollutants, water, feces, dirt, debris, and noxious odors" from the sewer system, or "raw sewage contain[ing] water, urine, fecal matter, used toilet products, debris, dirt, noxious odors, and other organic and inorganic contaminants of unknown origin and toxicity," or "raw sewage ... [that] contained human feces and other toxic substances." Further, the policy defines "pollutant" as *"any* solid, liquid, [or] gaseous ... contaminant, including ... waste" (emphasis supplied). See *McGuirk, supra* at 355-356. We conclude that defendant presented sufficient evidence to establish that the homes were flooded with a mixture that constitutes a pollutant under the policy. In sum, we find that the pollution exclusion is unambiguous and applicable, and thus defendant cannot be held liable. *Churchman, supra.*

*4 Further, we find unavailing plaintiffs' reliance on the trial court's use of the rule of reasonable expectations. [FN2] Despite the clear language of the policy, the trial court applied the rule of reasonable expectations, i.e., the court considered whether the policyholder was led to a reasonable expectation of coverage by reading the policy. However, because the insurance contract, including the pollution exclusion, is clear and unambiguous, the rule of reasonable expectations is not applicable. *Wilkie v. Auto-Owners Ins Co,* __ Mich. __, __; 664 NW2d 776 (2003); *Geller v. Farmers Ins Exchange,* 253 Mich.App 664, 669; 659 NW2d 646 (2002). Indeed, our Supreme Court recently explained:

> The rule of reasonable expectations clearly has no application to unambiguous contracts. That is, one's alleged "reasonable expectations" cannot supersede the clear language of a contract. Therefore, if this rule has any meaning, it can only be that, if there is more than one way to reasonably interpret a contract, i.e., the contract is ambiguous, and one of these interpretations is in accord with the reasonable expectations of the insured, this interpretation should prevail. However, this is saying no more than that, if a contract is ambiguous and the parties' intent cannot be discerned from extrinsic evidence, the contract should be interpreted against the insurer. In other words, when its application is limited to ambiguous contracts, the rule of reasonable expectations is just a surrogate for the rule of construing against the drafter. [*Wilkie, supra.*]

Having determined that the trial court erred in finding coverage, we need not address defendants' remaining issues on appeal.

Reversed and remanded for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

2003 WL 21854655 (Mich.App.)

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> FN2. We also find without merit plaintiffs' argument suggesting that an alternative basis to affirm the trial court's decision is that defendant did not assert any specific affirmative defenses such as the pollution exclusion. Having reviewed defendant's proffered affirmative defenses, we find that the language used in defendant's affirmative defenses was sufficient to put plaintiffs on notice that defendant would defend on the basis of the agreement, which includes the pollution exclusion at issue here.

C
Motions, Pleadings and Filings

United States District Court,
E.D. Michigan,
Southern Division.

UNITED STATES FIRE INS. CO., Plaintiff,
v.
CITY OF WARREN, Defendant.

No. CIV. 00-40237.

Nov. 6, 2001.

Liability insurer sought reimbursement from insured city for payments made to homeowners to settle claims against insured arising from sewer backup that occurred after heavy rain. On insurer's motion for summary judgment, the District Court, Gadola, J., held that: (1) insured waived equitable estoppel defense by failing to raise it earlier, and (2) absolute pollution exclusion applied regardless of whether homeowners' alleged injuries were caused by "traditional environmental pollution."

Motion granted.

West Headnotes

[1] Federal Civil Procedure 759
170Ak759 Most Cited Cases
Defense of equitable estoppel was waived in insurer's action seeking reimbursement of settlement payments from insured, where insured waited almost six months before filing answer, which did not contain estoppel defense, and 13 months more, until its answer to insurer's summary judgment motion, before raising estoppel issue, even though facts underlying defense should have been well known at time of original answer. Fed.Rules Civ.Proc.Rule 8(c), 28 U.S.C.A.

[2] Federal Civil Procedure 751
170Ak751 Most Cited Cases
Where failure to raise affirmative defense in answer does not cause surprise or unfair prejudice to plaintiff, district court may, in its discretion, allow issue to be raised on summary judgment motion. Fed.Rules Civ.Proc.Rules 8(c), 56, 28 U.S.C.A.

[3] Insurance 2278(17)
217k2278(17) Most Cited Cases
Under Michigan law, raw sewage that backed up out of insured city's sewer system after heavy rains was "pollutant" within absolute pollution exclusion of liability insurance policy, and thus payments to homeowners for their alleged health problems and property damage resulting from backup were not covered regardless of whether alleged injuries were characterized as caused by "traditional environmental pollution."

[4] Insurance 2117
217k2117 Most Cited Cases
Under Michigan law, insurer bears burden of establishing that an exclusion applies.

[5] Insurance 1832(1)
217k1832(1) Most Cited Cases

[5] Insurance 1836
217k1836 Most Cited Cases
Under Michigan law, court must construe any ambiguity in insurance policy in favor of insured and in favor of coverage.

*729 Christopher E. Le Vasseur, Michael H. Whiting, Stark, Reagan, Troy, MI, for Plaintiff.

Michael J. Watza, Richard M. Mitchell, Christina A. Ginter, Kitch, Drutchas, Detroit, MI, Albert B. Addis, Albert B. Addis Assoc., Mt. Clemens, MI, for Defendant.

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

GADOLA, District Judge.

Before the Court is Plaintiff's motion for summary judgment [docket entry 23]. Regarding this matter, the parties have provided the Court with extensive briefs and the Court has held a hearing in open court. For the reasons set forth below, the Court will grant Plaintiff's motion.

I BACKGROUND

Plaintiff is an insurance company with which Defendant municipality had primary and umbrella insurance policies that covered, *inter alia,* liability arising from bodily and property damage. Pollution exclusions applied to both policies.

EXHIBIT 3

Defendant experienced heavy rainfall on February 17 and 18, 1998. On February 23, 1998, a number of homeowners filed suit against Defendant, alleging that sewage had escaped from Defendant's sewers and entered the homeowners' properties, ***730** causing extensive damage. These homeowners argued that Defendant was liable to them for bodily and property damage caused by a backup of effluent from Defendant's sewer system that had, *inter alia,* deposited "bacteria, viruses, spores and other disease organisms which caused health problems among certain Plaintiffs and which damaged the property of all Plaintiffs among other injuries and damages." (Pl.Ex. H at ¶ 27.5.)

Plaintiff paid $1,575,000.00 in settlement of the actions homeowners brought against Defendant. Those payments were subject, however, to Plaintiff's express reservation of its right to seek recovery from Defendant for those payments. In the case at bar, Plaintiff now seeks repayment from Defendant.

II LEGAL STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is appropriate where the moving party demonstrates that there is no genuine issue of material fact as to the existence of an essential element of the nonmoving party's case on which the nonmoving party would bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Martin v. Ohio Turnpike Commission,* 968 F.2d 606, 608 (6th Cir.1992).

In considering a motion for summary judgment, the Court must view the facts and draw all reasonable inferences therefrom in a light most favorable to the nonmoving party. *60 Ivy Street Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th Cir.1987). The Court is not required or permitted, however, to judge the evidence or make findings of fact. *Id.* at 1435-36. The moving party has the burden of showing conclusively that no genuine issue of material fact exists. *Id.* at 1435.

A fact is "material" for purposes of summary judgment where proof of that fact would have the effect of establishing or refuting an essential element of the cause of action or a defense advanced by the parties. *Kendall v. Hoover Co.,* 751 F.2d 171, 174 (6th Cir.1984). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Accordingly, where a reasonable jury could not find that the nonmoving party is entitled to a verdict, there is no genuine issue for trial and summary judgment is appropriate. *Id.; Feliciano v. City of Cleveland,* 988 F.2d 649, 654 (6th Cir.1993).

Once the moving party carries the initial burden of demonstrating that no genuine issues of material fact are in dispute, the burden shifts to the nonmoving party to present specific facts to prove that there is a genuine issue for trial. To create a genuine issue of material fact, the nonmoving party must present more than just some evidence of a disputed issue. As the United States Supreme Court has stated, "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmoving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,* 477 U.S. at 249-50, 106 S.Ct. 2505 (citations omitted); *see Celotex,* 477 U.S. at 322-23, 106 S.Ct. 2548; ***731***Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Consequently, the nonmoving party must do more than raise some doubt as to the existence of a fact; the nonmoving party must produce evidence that would be sufficient to require submission of the issue to the jury. *Lucas v. Leaseway Multi Transportation Service, Inc.,* 738 F.Supp. 214, 217 (E.D.Mich.1990), *aff'd,* 929 F.2d 701 (6th Cir.1991). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505; *see Cox v. Kentucky Department of Transportation,* 53 F.3d 146, 150 (6th Cir.1995).

III ANALYSIS

Plaintiff argues that the pollution exclusions involved in this case militate toward entry of summary judgment in its favor. Defendant argues that Plaintiff's position is substantively incorrect and that Plaintiff is estopped from making such an argument. The Court will address the latter argument first.

A. Equitable Estoppel

[1] Defendant argues that the doctrine of equitable estoppel prevents Plaintiff from relying on the pollution exclusions. Plaintiff argues that Defendant's failure to assert this defense before its response to Plaintiff's motion for summary judgment effects a waiver of that defense.

[2] Federal Rule of Civil Procedure 8(c) requires litigants to set forth affirmative defenses in their answers. *Macurdy v. Sikov & Love, P.A.*, 894 F.2d 818, 824 (6th Cir.1990). "Generally, a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278 (1990 & Supp.2001). Where the failure to raise an affirmative defense before summary judgment does not cause surprise or unfair prejudice to the plaintiff, however, this Court, in its discretion, may allow the issue to be raised on summary judgment. *Smith v. Sushka*, 117 F.3d 965, 969 (6th Cir.1997).

In this case, Defendant waited almost six months after Plaintiff filed its complaint to file its answer and affirmative defenses. Neither of those documents included the defense of equitable estoppel, even though any facts underlying that defense should have been well known to Defendant when Plaintiff brought this action. Defendant instead waited more than thirteen months before raising the defense of equitable estoppel in its response to Plaintiff's motion for summary judgment.

In *Macurdy*, a case in which the defendants waited almost nineteen months after the filing of the complaint to plead an affirmative defense, the Sixth Circuit stated that "to allow the defendants to raise this affirmative defense initially at the summary judgment motion would violate Rule 8(c) and unfairly prejudice the plaintiff, which is why the rule requires that such a defense be asserted in the answer. We hold that this defense has been waived."

Given the similarities between this case and *Macurdy*, the Court holds that Defendant has waived the defense of equitable estoppel.

B. Pollution Exclusions

[3][4][5] The insurer bears the burden of establishing that an exclusion applies. *Heniser v. Frankenmuth Mut. Ins.*, 449 Mich. 155, 534 N.W.2d 502, 505 n. 6 (1995) (quoting *Arco Indus. Corp. v. American Motorists Ins. Co.*, 448 Mich. 395, 424-25, 531 N.W.2d 168 (1995) (Boyle, J. concurring)). The Court must construe any ambiguity in the policy in favor of the insured and in favor of coverage. *732*Fire Ins. Exch. v. Diehl*, 450 Mich. 678, 545 N.W.2d 602, 606 (1996). Plaintiff argues that an unambiguous pollution exclusion in each of the policies it sold to Defendant precludes coverage for claims of pollution-related property and bodily damage.

The primary policy excluded from coverage, *inter alia*, " '[b]odily injury' or 'property damage' arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants." The umbrella policy excluded from coverage "bodily injury" and "property damage" "which would not have occurred in whole or in part but for the actual alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'Pollutants' at any time." Both policies contained the same definition of "pollutants": "Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned, or reclaimed."

The most important case upon which Plaintiff relies is *McGuirk Sand & Gravel, Inc. v. Meridian Mut. Ins. Co.*, 220 Mich.App. 347, 559 N.W.2d 93 (1996). The pollution exclusion of the primary policy and the definition of "pollutants" in the case at bar are, verbatim, the same as the pollution exclusion and definition of pollutants at issue in *McGuirk*. *Id.* at 95. The pollution exclusion of the umbrella policy is not materially different from the pollution exclusion in *McGuirk*.

In *McGuirk*, the Michigan Court of Appeals concluded that the pollution exclusion at issue was an "absolute pollution exclusion" that was unambiguous and operated to exclude from coverage all claims alleging damage caused by pollution. *Id.* at 96-97. Accordingly, the *McGuirk* court held that an insurance company was entitled to summary disposition against the insured's claim that the insurer had a duty to defend and indemnify it against suits arising from the insured's alleged spilling of liquid pollutants.

Given the law as enunciated in *McGuirk*, this Court concludes that the pollution exclusions in this case are unambiguous and serve to establish that Plaintiff was not obligated to indemnify the homeowners for claims that they suffered from Defendant's

"pollution."

The question thus becomes whether, in light of the homeowners' claim that sewage intruded from Defendant's sewer into their homes and deposited "bacteria, viruses, spores and other disease organisms which caused health problems among certain Plaintiffs and which damaged the property of all Plaintiffs among other injuries and damages," there is an issue of material fact as to whether the homeowners' claims alleged damage caused by pollution. If so, *McGuirk* would lead to the conclusion that, as a matter of law, Plaintiff was not required to indemnify the homeowners.

Under the law of Michigan as enunciated in *Royal Ins. Co. v. Bithell,* 868 F.Supp. 878 (E.D.Mich.1993) (Duggan, J.), the Court concludes that the homeowners' claims alleged damages caused by pollution. Any backup of raw sewage into the homeowners' properties from Defendant's sewer would be a discharge of pollution. This is so because "raw sewage is clearly a contaminant" that would be covered by an exclusion from coverage of any "[l]oss caused by release, discharge, or dispersal of contaminants or pollutants." *Id.* at 881. Given the similarity between the pollution exclusion in *Bithell* and the pollution exclusions at bar, Defendant's discharge of sewage into the homeowners' properties would be a discharge covered by the pollution exclusion. Thus, summary judgment in Plaintiff's favor is appropriate.

*733 Defendant disagrees, pointing out that the Sixth Circuit, applying Michigan law, has reasoned that a pollution exclusion very similar to those at bar [FN1] "applies only to injuries caused by traditional environmental pollution." *Meridian Mut. Ins. Co. v. Kellman,* 197 F.3d 1178, 1181 (6th Cir.1999). Because there would almost certainly be an issue of material fact as to whether the homeowners alleged harms that "traditional environmental pollution" caused, Defendant argues, the Court must not grant summary judgment to Plaintiff.

> FN1. In *Kellman,* the exclusion covered " 'property damage' which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." *Kellman,* 197 F.3d at 1180.

The Court disagrees. To whatever extent *McGuirk* and *Kellman* might not coincide, this Court will follow *McGuirk* because Michigan state courts provide a more authoritative construction of state law than do federal courts. *See Litka v. University of Detroit Dental Sch.,* 610 F.Supp. 80, 83 (E.D.Mich.1985) (Pratt, J.). This Court also agrees with Judge Quist of the U.S. District Court for the Western District of Michigan that the *Kellman* panel's failure to discuss *McGuirk* was "inexplicable," and thus weakens the persuasiveness of *Kellman. Gulf Ins. Co. v. City of Holland,* No. 1:98- CV-774, 2000 U.S. Dist. Lexis 19602, at *16 (W.D. Mich. Apr. 3, 2000).

This Court holds that the absolute pollution exclusions involved in this case precluded coverage for the homeowners' claims against Defendant.

IV CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment [docket entry 23] is **GRANTED.**

IT IS FURTHER ORDERED that Defendant shall pay Plaintiff $1,575,000 within thirty (30) days of entry of this order.

SO ORDERED.

Motions, Pleadings and Filings **(Back to top)**

- 4:00CV40237 (Docket) (Jun. 09, 2000)

END OF DOCUMENT

C
Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals,
Sixth Circuit.

UNITED STATES FIRE INSURANCE COMPANY, Plaintiff-Appellee, Cross-Appellant,
v.
CITY OF WARREN, Defendant-Appellant/Cross-Appellee.

Nos. 02-1066, 02-1082 and 02-1085.

Dec. 23, 2003.

Background: City's commercial general liability insurance carrier brought action demanding reimbursement for amounts it had paid to settle city residents' lawsuits to recover for damages from sewage backup and for its costs in defending actions. The United States District Court for the Eastern District of Michigan entered summary judgment in favor of insurer, but denied attorney fees and prejudgment interest. City appealed, and insurer cross-appealed.

Holdings: The Court of Appeals, Batchelder, Circuit Judge, held that:
(1) city residents' claims for damages caused by sewage backup fell within total pollution exclusion;
(2) district court did not abuse its discretion in holding that insured waived its affirmative defense of equitable estoppel; but
(3) insurer was entitled to prejudgment interest.
Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] **Insurance** 2278(17)
217k2278(17) Most Cited Cases
Under Michigan law, backed up sewage was "pollutant," for purposes of total pollution exclusion in city's commercial general liability policy and umbrella policy, and thus policies did not cover city residents' claims for damages caused by sewage backup, where policies defined "pollutant" as "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

[2] **Federal Civil Procedure** 759
170Ak759 Most Cited Cases
District court did not abuse its discretion in holding that insured waived its affirmative defense of equitable estoppel in insurer's action seeking reimbursement for payments made to settle lawsuits, even if insured had previously raised equitable estoppel in state court action involving both parties, where insured waited almost six months from time suit was filed to set forth its answer and more than thirteen months before it raised its equitable estoppel claim in response to insurer's motion for summary judgment, state court action involved different claims, and insured offered no explanation for its delay in asserting defense. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

[3] **Insurance** 3585
217k3585 Most Cited Cases
District court did not abuse its discretion by refusing to grant attorney fees to insurer after entry of summary judgment in favor of insurer in its action seeking reimbursement from insured for payments made to settle lawsuits, where insurer's brief in support of its motion for summary judgment addressed only reimbursement of settlement amounts, and, although court could have awarded fees, law did not require it to do so. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

[4] **Interest** 39(2.35)
219k39(2.35) Most Cited Cases
Under Michigan law, insurer's action against insured seeking to recover payments made to settle lawsuits against insured was for reimbursement, not restitution, and thus monetary award in favor of insurer did not fall within equitable action exception

EXHIBIT 4

to rule requiring payment of prejudgment interest. M.C.L.A. § 600.6013.

*486 On Appeal from the United States District Court for the Eastern District of Michigan.

Michael H. Whiting, Christopher E. LeVasseur, Stark, Reagan & Finnerty, Troy, MI, for Plaintiff-Appellee Cross-Appellant.

Christina A. Ginter Kitch, Drutchas, Wagner, DeNardis & Valitutti, Detroit, MI, Timothy S. Groustra, Kitch, Drutchas, Wagner, Mt. Clemens, MI, for Defendant-Appellant Cross-Appellee.

BEFORE: BATCHELDER and ROGERS, Circuit Judges; and RUSSELL, [FN*] District Judge.

FN* The Honorable Thomas B. Russell, District Judge, United States District Court for the Western District of Kentucky, sitting by designation.

*487 BATCHELDER, Circuit Judge.

**1 Several residents of the City of Warren ("Warren") suffered property damage when the city's sewage system backed up and spilled into their homes. Under a reservation of right to decline coverage because the policy contained an absolute pollution exclusion, plaintiff United States Fire Insurance Company ("U.S.Fire"), Warren's commercial general liability insurance carrier, defended the city in a class action and several other lawsuits filed in state court by property owners seeking to recover for the damage from the sewage backup. When Warren eventually settled with the plaintiffs, U.S. Fire paid the settlement amounts, reserving its right to seek reimbursement for those amounts and the costs incurred in defending the actions. U.S. Fire then brought this action in diversity against Warren seeking a judgment that it is not liable for the claims that are the subject of the state court actions and demanding reimbursement for the amounts U.S. Fire had paid under the settlement and for its costs in defending the actions. The district court, on cross-motions for summary judgment, held that the pollution exclusion relieved U.S. Fire of liability for property damage arising from the sewage spills, awarding judgment to U.S. Fire in the amount of $1,575,000 plus costs "in accordance with Fed.R.Civ.P. 54(d)(1)." The court further ruled that Warren could not raise the affirmative defense of estoppel for the first time on summary judgment, and denied a post-judgment motion filed by Warren to amend the judgment, amend its affirmative defenses, or both, as well as a post-judgment motion by U.S. Fire seeking attorney's fees and prejudgment interest. We now affirm the judgment of the district court, except on the issue of prejudgment interest, to which we hold U.S. Fire is entitled under Michigan law.

I

Heavy rains in February 1998 caused a backup of sewage in Warren's system, and some of this sewage entered into and damaged multiple residences. Affected property owners filed a class action and other lawsuits in state court against Warren seeking recompense for the property damage and health problems caused by the infiltration of their homes of sewage containing "pathogens, carcinogens and disease carrying organisms including but not limited to HIV viruses, *e. coli* bacteria, hepatitis (all strains), [and] other bacteria." U.S. Fire, which had issued to Warren both primary and umbrella insurance policies covering, among other things, liability arising from bodily injury and property damage, defended Warren in the state court actions, while reserving for itself the right "to decline coverage based upon the pollution exclusion contained in the policies."

Both the commercial general policy and the umbrella policy written by U.S. Fire are subject to a "total pollution exclusion" which provides that U.S. Fire will not cover injuries or property damage arising in whole or in part from "the actual, alleged, or threatened discharge, dispersal, [seepage, migration,] release or escape of 'Pollutants' [at any time]." [FN1] "Pollutants" are defined as "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed." *Id.* at 20. Eventually, Warren settled with the plaintiffs for $1,575,000. U.S. Fire paid the judgment *488 on behalf of Warren while reserving its right to seek reimbursement from Warren for the judgment paid and costs incurred in defending the suit.

FN1. The language in brackets indicates language differences between the policies.

**2 U.S. Fire filed the instant action in diversity against the City of Warren seeking a declaration that it was not liable for the claims in the state court actions due to the pollution exclusion in the insurance policies, and requesting $1,575,000 plus attorneys fees, costs, "and other liabilities incurred in defending the dismissed underlying litigation." [FN2] Approximately nine months later, in a state court

declaratory action brought by Warren against U.S. Fire and another insurance company, Warren filed a motion contending, for the first time in any of the lawsuits arising from the sewage damage, that U.S. Fire should be equitably estopped from relying on the pollution exclusion in the insurance contracts because U.S. Fire had paid out on sewage backup claims in the past. Warren did not, however, seek leave to amend its answer and affirmative defenses in the present federal court action in order to assert equitable estoppel as an affirmative defense.

> FN2. The present action is, as far as we know, the latest suit involving U.S. Fire and Warren arising from the sewage spills in February 1998. Litigation between the parties on this matter has been going on in state and federal court for some time now. Because we are satisfied of our own jurisdiction, which we have pursuant to 28 U.S.C. § § 1291 and 1332, and neither party argued in its briefs that we are precluded from considering this case, we will proceed to consider its merits.

U.S. Fire filed a motion for summary judgment. In its response/counter-motion for summary judgment, Warren raised for the first time in federal court the affirmative defense of equitable estoppel. The district court granted U.S. Fire's motion, holding that Warren had waived its defense of equitable estoppel by not raising it at an earlier stage in the litigation, and that, pursuant to Michigan law, the "absolute pollution exclusion" present in the insurance contracts between U.S. Fire and Warren was unambiguous and applied to the sewage leak at issue. The district court awarded U.S. Fire the $1,575,000 that it had paid out in settlement of the state court lawsuits against Warren.

Warren then filed a "motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e), for relief from judgment pursuant to Fed.R.Civ.P. 60(b), and/or to amend the affirmative defenses pursuant to Fed.R.Civ.P. 15(b)," which the district court denied. The court also denied a motion filed by U.S. Fire "for settlement and entry of final judgment," in which U.S. Fire requested that the court increase the amount of its judgment to include additional damages, prejudgment interest, and costs, because U.S. Fire had requested only $1,575,000, but not attorney's fees or prejudgment interest, in its motion for summary judgment.

On appeal, Warren argues that the pollution exclusion is ambiguous, and that the exclusion does not permit U.S. Fire to deny coverage for the sewage incidents. Moreover, Warren argues, the district court erred in holding that Warren had waived its affirmative defense of equitable estoppel, and equitable estoppel does, in fact, prevent U.S. Fire from denying coverage. On cross-appeal, U.S. Fire argues that the district court abused its discretion by failing to award prejudgment interest, as well as attorneys' fees incurred in defense of the state court action, to U.S. Fire.

II

We review de novo the district court's holding on summary judgment that U.S. ***489** Fire is not required to indemnify Warren based upon the pollution exclusion contained in the insurance contracts between the parties. *Cincinnati Ins. Co. v. Zen Design Group, Ltd.*, 329 F.3d 546, 551-52 (6th Cir.2003). Warren argues that the insurance policies are ambiguous, that waste refers "clearly to the leftovers of industrial process and not to natural, biological waste," and that the City had a reasonable expectation that the insurance contracts covered such a common occurrence as sewer backup.

****3** Michigan law, which governs the court's interpretation of the insurance contracts in this diversity action, indicates that U.S. Fire is not liable to cover the sewage damage in this case. In *Allstate Ins. Co. v. Keillor*, 450 Mich. 412, 537 N.W.2d 589 (Mich.1995), the Michigan Supreme Court spoke generally about the interpretation of insurance contracts and exclusion provisions therein:

> An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. Accordingly, the court must look at the contract as a whole and give meaning to all terms. Further, any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy. This Court cannot create ambiguity where none exists.
>
> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. However, coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume.

Id. at 591 (citations and internal quotations omitted). Moreover, we are to construe ambiguities in the

contract in favor of the insured, and "strictly construe[ ] against the insurer exemptions that preclude coverage for the general risk." *Fire Ins. Exch. v. Diehl*, 450 Mich. 678, 545 N.W.2d 602, 606 (Mich.1996) (citations and internal quotations omitted). *But cf. Wilkie v. Auto-Owners Ins. Co. (In re Estate of Wilkie)*, 469 Mich.41, 664 N.W.2d 776 (Mich.2003) (holding that where the terms of a contract are unambiguous, they are *not* strictly construed against the insurer, and that the court should not look to the insured's reasonable expectations of what risks are covered under the contract).

[1] As a matter of contractual interpretation, we think that the pollution exclusion contained in the contracts between Warren and U.S. Fire is unambiguous, and clearly pertains to the escape of sewage waste onto the property of the Warren homeowners. The influx of sewage into the homes of various Warren residents constituted an "escape" of waste water and sewage. Moreover, regardless of whether sewage is considered "traditional" environmental pollution of the industrial sort, we think that it is composed of "solid, liquid, [or] gaseous ... irritant[s] or contaminant[s], including ... waste." The sewage that escaped falls squarely under the definition of "pollutant," and the pollution exclusion therefore applies to exclude coverage under the U.S. Fire policies for these claims. Michigan case law supports this interpretation.

In *McGuirk Sand and Gravel, Inc. v. Meridian Mut. Ins. Co.*, 220 Mich.App. 347, 559 N.W.2d 93 (Mich.Ct.App.1996), the Michigan Court of Appeals held that an insurance contract that excluded coverage for damage "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants." *id.* at 95, ***490** was unambiguous. The court noted that while there was no appellate court authority in Michigan at that time interpreting absolute pollution exclusions, such exclusions are, in general, "unambiguous and operate to exclude coverage for all claims alleging damage caused by pollution." *Id.* at 96-97.

**4 Distinguishing our decision in *Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178 (6th Cir.1999), in which we implied "that a pollution exclusion clause in a [commercial general liability] insurance policy applies only to injuries caused by traditional environmental pollution," *id.* at 1180, the Michigan courts have recently made it clear that pollution exclusion provisions in insurance contracts *do* cover more than just "traditional" environmental pollution. In *McKusick v. Travelers Indemnity Co.*, 246 Mich.App. 329, 632 N.W.2d 525 (Mich.Ct.App.2001), the court wrote,

> [a]though we recognize that other jurisdictions have considered the terms "discharge," "dispersal," "release," and "escape" to be environmental terms of art, thus requiring the pollutant to cause traditional environmental pollution before the exclusion is applicable, we cannot judicially engraft such limitation. This Court must enforce the insurance policy in accordance with its terms as interpreted in light of their commonly used, ordinary, and plain meanings.

Id. at 531.

This court sitting in diversity must do the same. The pollution exclusion in Warren's contracts with U.S. Fire clearly applies to the events at issue in this case, and Warren is not entitled to coverage under its policies with U.S. Fire for damage caused by the escape of waste from the sewer system.

III

Warren, which asserted its defense of equitable estoppel for the first time in its response to U.S. Fire's motion for summary judgment, argues that the district court should have allowed it to raise that defense because U.S. Fire has not shown that it would have suffered unfair surprise or prejudice by addressing the defense at the summary judgment stage of the litigation. We treat "legal theories first raised in [a party's] response to a motion for summary judgment as an implicit motion to amend the complaint when all of the relevant facts had previously been pled." *Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733, 740 (6th Cir.1999). We will do the same here-although the relevant facts upon which Warren could base a claim for equitable estoppel may not have been pled in this instance-and will consider the district court's refusal at summary judgment to entertain Warren's estoppel defense in conjunction with Warren's post-judgment motion to amend its complaint.

In its motion, Warren invoked Federal Rules of Civil Procedure 15, 59, and 60. Rule 15 permits a party to amend its pleading "only by leave of the court," which "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Rule 59(e) permits motions to alter or amend a judgment. Under Rule 60, "the court may relieve a party ... from a final judgment, order, or proceeding for ... mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1).

We review the district court's holdings with respect to Rule 15(a) and Rule 60(b) motions for abuse of discretion. *Super Sulky*, 174 F.3d at 740 (Rule 15); *Tareco Props., Inc. v. Morriss*, 321 F.3d 545, 548 (6th Cir.2003) (Rule 60(b)). "[W]hen a Rule 59(e) motion seeks reconsideration of a grant of summary judgment, we conduct ***491** a de novo review using the same legal standard employed by the district court." *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 454-55 (6th Cir.2003). Here, however, because we treat Warren's estoppel theories, raised initially at the summary judgment stage, as a motion to amend the complaint, and such motions are reviewed for an abuse of discretion, we will review its Rule 59 motion for abuse of discretion. *See Super Sulky*, 174 F.3d at 740; *see also Smith v. Sushka*, 117 F.3d 965, 969 (6th Cir.1997) (reviewing district court's consideration on summary judgment of a tardily-raised affirmative defense for an abuse of discretion).

****5** [2] We do not think that the district court abused its discretion in holding that Warren waived its affirmative defense of equitable estoppel. In *Macurdy v. Sikov & Love, P.A.*, 894 F.2d 818 (6th Cir.1990), the defendants did not plead the defense of accord and satisfaction in their answer, but instead waited until summary judgment to raise that defense. *Id.* at 820. Noting that "the defendants waited almost a year before filing their answer and almost nineteen months before raising the issue of accord and satisfaction in their motion for summary judgment," we held that "to allow the defendants to raise this affirmative defense initially at the summary judgment motion would violate Rule 8(c) and unfairly prejudice the plaintiff." *Id.* at 824. While the district court in the instant case recognized that under *Smith v. Sushka* it *could* permit Warren to raise its affirmative defense for the first time on summary judgment, it noted the similarity of the facts in *Macurdy* to those in the case at hand: Warren waited almost six months from the time the suit was filed to set forth its answer and more than thirteen months before it raised its equitable estoppel claim.

Warren argues that we should amend the district court's judgment and allow Warren to raise its affirmative defense because U.S. Fire did not claim that it would be unfairly surprised or prejudiced if Warren were permitted to raise its defense, and that U.S. Fire was on notice that Warren might assert such a defense because Warren had asserted equitable estoppel in a state court action that involved both parties (as well as others) but different claims. While we agree that U.S. Fire was on notice that Warren *might* present such a defense in federal court, the fact that Warren presented the defense in state court but did not do so in federal court could have led U.S. Fire reasonably to believe that Warren had made a conscious decision *not* to raise the defense in federal court. And even if U.S. Fire did not claim before the district court that it would suffer prejudice if it had to respond to the estoppel defense, Warren has not offered any explanation for its own tardiness. "[I]n the post-judgment context, we must be particularly mindful of not only potential prejudice to the non-movant, but also the movant's explanation for failing to seek leave to amend prior to the entry of judgment." *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir.2002). The movant in this case has no such explanation, and has not shown that it even made a good faith effort to comply with the standard procedure for raising affirmative defenses. The district court did not abuse its discretion by denying Warren's attempts to raise tardily its affirmative defense of equitable estoppel.

IV

After the district court granted summary judgment in favor of U.S. Fire, awarding it $1,575,000, U.S. Fire moved for "settlement and entry of judgment," and requested that the district court add to its total award both attorneys' fees for ***492** defending Warren in the state court actions, and prejudgment interest on the entire amount. The district court, analyzing U.S. Fire's motion as one made under Rule 59(e), determined that there was no intervening change in controlling law or new evidence that would warrant granting the Rule 59(e) motion, nor was there a need to correct a clear error of law or prevent a manifest injustice. Moreover, the court held that it was entitled to rely upon U.S. Fire's brief in order to define the scope of the issues at bar, and noted that it had given U.S. Fire exactly what U.S. Fire had requested in its brief.

****6** In general, we review a district court's ruling on a Rule 59(e) motion for an abuse of discretion. *Northland Ins. Co.*, 327 F.3d at 454. "Motions to alter or amend judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice." *GenCorp, Inc. v. American Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir.1999) (citations omitted).

[3] The district court did not abuse its discretion by refusing to grant attorneys' fees to U.S. Fire. While

U.S. Fire presents some case law indicating that the district court *could* have awarded attorneys' fees, it does not point to any law that *requires* the district court to do so. Nor does U.S. Fire plead that it has come across newly-discovered evidence or a change in law that would affect the issue. U.S. Fire is left, therefore, with demonstrating that granting its Rule 59(e) motion is necessary to prevent a manifest injustice. While U.S. Fire's complaint demanded reimbursement for attorneys' fees from the *Grabowski* action, its brief in support of summary judgment in the district court addressed only reimbursement of the $1,575,000 it paid on Warren's behalf. The denial of the Rule 59(e) motion does not work a manifest injustice in this instance, and the district court did not abuse its discretion in refusing to re-open the judgment in order to entertain arguments on attorneys' fees.

[4] We are, however, persuaded by U.S. Fire's argument that the district court was required to award U.S. Fire prejudgment interest pursuant to Mich. Comp. L. § 600.6013, which provides, in pertinent part, that "[i]nterest is allowed on a money judgment recovered in a civil action." § 600.6013(1) (2003). State law controls questions of prejudgment interest in diversity actions. *See FDIC v. First Heights Bank, FSB*, 229 F.3d 528, 542 (6th Cir.2000).

Michigan courts have consistently held that prejudgment interest under § 600.6013 is required on a money judgment: "The purpose of this statute is to compensate the prevailing party for loss of use of the funds awarded as a money judgment and to offset the costs of litigation. An award of interest is mandatory in all cases to which the statute applies." *Rodriguez v. Farmers Ins. Group*, 251 Mich.App. 454, 651 N.W.2d 428, 432 (Mich.Ct.App.2002); *see also Hevler v. Dixon*, 160 Mich.App. 130, 408 N.W.2d 121, 130 (Mich.Ct.App.1987); *McGraw v. Parsons*, 142 Mich.App. 22, 369 N.W.2d 251, 253-54 (Mich.Ct.App.1985).

Warren attempts to avoid this rule by relying upon the rule's exception, namely, that awarding prejudgment interest is discretionary, not mandatory, in equitable actions. While Warren characterizes the exception accurately, *see, e.g., Saber v. Saber*, 146 Mich.App. 108, 379 N.W.2d 478, 479 (Mich.Ct.App.1985) ("In equitable actions, ... the question of interest is a discretionary matter for the trial court"), its claim that the present action is one in equity because U.S. Fire is seeking the equitable remedy of restitution is unavailing. In *493 *Michigan Department of Treasury v. Central Wayne County Sanitation Authority*, 186 Mich.App. 58, 463 N.W.2d 120 (Mich.Ct.App.1990), the plaintiff sought and obtained a court order directing the defendant to pay any surveillance fees it owed to the plaintiff. *Id.* at 121. Because the plaintiff had sought not just a judgment declaring defendant responsible for fees, but also sought payment of those fees, the Court of Appeals characterized the order as a "money judgment," thereby bringing it under § 600.6013. *Id.* at 122; *see also Michigan ex rel. Wayne County Prosecutor v. $176,598.00*, 465 Mich. 382, 633 N.W.2d 367, 369 (Mich.2001) ("For the purpose of the judgment interest statute, a money judgment is one that orders the payment of a sum of money, as distinguished from an order directing an act to be done or property to be restored or transferred."). The judgment in this case is for reimbursement, and is undoubtedly a "money judgment" subject to § 600.6013.

**7 Since the district court in the present case was required by Michigan law to award prejudgment interest pursuant to § 600.6013, the court committed a clear error of law in not granting U.S. Fire's Rule 59(e) motion. *See O'Sullivan Corp. v. Duro-Last, Inc.*, No. 99-2190, 2001 WL 345598 at *9-*10 (6th Cir. March 28, 2001) (holding that the district court erred by refusing to grant the prevailing party's Rule 59(e) motion and to award it § 600.6013 prejudgment interest, even when the party had not requested such interest until after trial). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

V

We therefore REMAND this case to the district court for a determination and award of prejudgment interest, but AFFIRM the judgment of the district court on the other issues before us.

87 Fed.Appx. 485, 2003 WL 23172047 (6th Cir.(Mich.))

Briefs and Other Related Documents (Back to top)

- 02-1085 (Docket) (Jan. 22, 2002)
- 02-1082 (Docket) (Jan. 16, 2002)
- 02-1066 (Docket)

(Jan. 11, 2002)

END OF DOCUMENT

C
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

BITUMINOUS CASUALTY CORPORATION, an Illinois Corporation, Plaintiff-Appellee,
v.
R.J. TAYLOR CORPORATION, a Michigan Corporation, and Modular Installation Services, a Michigan Corporation, jointly and severally, Defendants-Appellants.

No. 203334.

May 8, 1998.

Before: HOEKSTRA, P.J., and JANSEN and GAGE, JJ.

PER CURIAM.

*1 Defendants appeal as of right from an order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and denying defendants' cross motion for summary disposition pursuant to the same court rule. We affirm.

The facts material to this case are not in dispute. Defendants constructed a modular classroom building for a local school. Complaints from users of the new facility led to an investigation determining that the ventilation system in the structure was faulty as installed, allowing sewer gas and carbon dioxide to collect inside the building. Consequently, various parties brought an action against defendants and others, alleging injuries from the exposure to hazardous gases or other airborne pollutants. In effect at the time in question was a commercial general liability insurance policy issued by plaintiff and naming both defendants as insured parties. Accordingly, defendant Taylor requested that plaintiff defend and indemnify it under the contract's provision covering products/completed operations; however, plaintiff denied any obligation to provide those services, citing a pollution exclusion within the contract, and filed this suit for declaratory relief.

In granting plaintiff's motion for summary disposition, the lower court held that the absolute pollution exclusion within the contract was valid. We review de novo the lower court's decision on the motions for summary disposition. *Miller v. Farm Bureau Mut Ins Co.* 218 Mich.App 221, 233; 553 NW2d 371 (1996). Summary disposition pursuant to MCR 2.116(C)(10) is appropriate when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* We hold that the lower court properly granted summary disposition to plaintiff.

The parties agree that the general provisions of the insurance contract, on their own terms, extend coverage for negligence resulting in bodily injury arising from the insured's completed work. At issue is whether the specific terms of the pollution exclusion, included by special endorsement, relieve plaintiff of the general duty to defend and indemnify as otherwise provided. Defendants proffer two primary arguments on appeal: first, that either from its plain words or as the result of internal ambiguities, the contract should be construed in favor of coverage in the area under dispute; and second, that when viewed in light of other documents plaintiff issued, the contract created in defendants a reasonable expectation that the pollution exclusion did not apply to the facts giving rise to this controversy.

First, regarding the language of the pollution exclusion, defendants do not dispute that when considered alone, the specific exclusions enumerated within the pollution exclusion would relieve plaintiff of its duty to defend and indemnify in the area at issue in the underlying causes of action. Instead, defendants argue that a comparison between the pollution and asbestos exclusions indicates that the pollution exclusion does not apply to its coverage for products/completed operations liability. The endorsement for the pollution exclusion announces that it modifies coverage under the commercial general liability form, owners and contractors protective liability form, and railroad protective liability form. In contrast, the endorsement for the asbestos exclusion states that it is modifying coverage under two of those same forms, plus a products/completed operations liability form. Defendants argue that this comparison reveals that

EXHIBIT 5

the pollution exclusion therefore does not apply to its products/completed operations liability coverage. Accordingly, defendants conclude that plaintiff is obligated to defend and indemnify pursuant to its coverage under the products/completed operations provision.

*2 Exclusionary clauses in insurance contracts must be strictly construed against the insurer. *Fire Ins Exchange v. Diehl*, 450 Mich. 678, 687; 545 NW2d 602 (1996). Additionally, ambiguities must be strictly construed against the drafter. *State Farm Mut Automobile Ins Co v Enterprise Leasing Co*, 452 Mich. 25, 38-39; 549 NW2d 345 (1996). However, defendants' attempt to render the pollution exclusion inapplicable to the provision for coverage for products/complete operations liability is without merit. As plaintiff points out, the policy in question does not include a separate form for products/completed operations coverage because that aspect of coverage comes under defendants' general liability coverage form, with the latter being explicitly subject to the pollution exclusion. Therefore, the comparison that defendants draw between the two endorsements is of no import to defendants' coverage. "[C]overage under a policy is lost if any exclusion within the policy applies to an insured's particular claims." *Auto-Owners Ins Co v. Churchman*, 440 Mich. 560, 567; 489 NW2d 431 (1992).

In the alternative, defendants argue that any conflict between the products/completed operations provision and the pollution exclusion should be resolved in favor of coverage under the products/completed operations provision. Defendants assert that because exclusionary clauses in insurance contracts are to be strictly construed against the insurer, the inclusionary language providing coverage generally should prevail over the pollution exclusion. Similarly, defendants argue that the inconsistency between the provision for coverage for products/completed operations and the pollution exclusion creates an ambiguity that should be resolved in favor of coverage.

As defendants conceded in the lower court, the pollution exclusion itself is not ambiguous; thus, it is unnecessary to construe that exclusion at all. Instead, the question is whether to give effect to its plain words in light of other contractual provisions. While it is true that the provision for products/completed operations hazards by itself suggests that coverage exists generally for negligence resulting in bodily injury arising from defendants' completed work, and that the pollution exclusion announces an exception to that coverage, this creates no ambiguity. To observe that an exclusionary provision in some way runs counter to a general provision is only to observe that an exclusionary provision is doing its job-carving out an exception to a contractual obligation that would otherwise exist. "Clear and specific exclusions must be given effect." *Auto-Owners Ins Co, supra* at 567. Because the pollution exclusion is itself clear and limits plaintiff's obligations as expressed generally in the contract, we conclude that the circuit court properly gave effect to the exclusion in granting plaintiff summary disposition.

Second, regarding their reasonable expectations, defendants argue that the lower court's determination of plaintiff's contractual obligations should have been influenced by language in plaintiff's "Important Notice." The notice, which was sent in proximity of the policy in effect between the parties in order to provide general advice, contains language implying that coverage exists in the area in question. Defendants assert that plaintiff should not be allowed to state in its "Important Notice" that coverage exists and then deny the significance of that statement.

*3 Defendants' reliance on the "Important Notice" to establish a reasonable expectation of coverage is misguided because the statements in the notice include emphatic indications that the policy alone determines an insured's coverage. The notice repeatedly announces itself as no substitute for the policy in effect and admonishes the insured to consult the actual policy to determine the scope of coverage. For example, an announcement on the first page printed in capital case letters admonishes the reader to carefully read the policy, adding that the policy alone determines the scope of coverage. An announcement on the third page of the document provides a similar cautionary statement.

These disclaimers avoid any resulting duty to expand the coverage within existing policies. "[U]nder the rule of reasonable expectation, the court grants coverage under the policy if 'the policyholder, upon reading *the contract language* is led to a reasonable expectation of coverage." ' *Fire Ins Exchange, supra* at 687 (quoting *Powers v. DAIIE*, 427 Mich. 602, 632; 398 NW2d 411 (1986) (emphasis added)). It would be poor public policy to force an insurer to broaden coverage provided in its contracts-especially where in direct contradiction of specific and prominently announced provisions of those contracts-as an incidental consequence of that insurer's attempt to provide information through general notices to its policyholders. Therefore, the lower court properly

found that defendants had no reasonable expectation of the coverage defendants sought and properly granted summary disposition to plaintiff.

Last, trying to equate this "Important Notice" with the contract at issue, defendants point out that the form of the notice closely resembles part of the policy itself. However, defendants cite no authority for the proposition that a separate, though seemingly related, document may join a contract if it is similar in form to parts of the contract; therefore, this Court will not credit that argument. *Speaker-Hines & Thomas, Inc v. Dep't of Treasury*, 207 Mich.App 84, 90-91; 523 NW2d 826 (1994). The circuit court properly found that the "Important Notice" was not part of the contract.

Affirmed.

1998 WL 1992911 (Mich.App.)

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Only the Westlaw citation is currently available.

United States District Court, W.D. Michigan.

GULF INSURANCE COMPANY,
Plaintiff/Counter-Defendant,
v.
CITY OF HOLLAND, Defendants/Counter-Plaintiff/Third-Party Plaintiff,
v.
TRAVELERS PROPERTY & CASUALTY COMPANY OF ILLINOIS, Third-Party Defendants.

No. 1:98CV774.

April 3, 2000.

Deborah Molitz, Orlans Associates, PC, Troy, MI, for Gulf Insurance Company, a foreign corporation, pltf.

Kenneth B. Breese, Cunningham Dalman, PC, Holland, MI, Ottawa, for Holland, City of, a Michigan Municipal Corporation, deft.

Kenneth B. Breese, Cunningham Dalman, PC, Holland, MI, Ottawa, for Holland, City of, counter-claimant.

Deborah Molitz, Orlans Associates, PC, Troy, MI, for Gulf Insurance Company, counterdeft.

Deborah Molitz, Orlans Associates, PC, Troy, MI, for Gulf Insurance Company, 3rd-party pltf.

Kenneth B. Breese, Cunningham Dalman, PC, Holland, MI, Ottawa, for Holland, City of, 3rd-party pltf.

Kenneth B. Breese, Cunningham Dalman, PC, Holland, MI, Ottawa, for Holland, City of, 3rd-party pltf.

Kenneth B. Breese, (See above), for Holland, City of, 3rd-party pltf.

Jeffrey R. Learned, Grotefeld & Denenberg LLC, Bingham Farms, MI, for Travelers Indemnity Company, 3rd-party deft.

OPINION

QUIST, J.

*1 Plaintiff, Gulf Insurance Company ("Gulf"), filed this action against Defendant, City of Holland ("Holland"), seeking a declaratory judgment that Gulf was not liable for Holland's insurance claims for property damage and related expenses stemming from a gas release. Holland counter-claimed for its insurance claims and filed two third-party lawsuits. The first suit, against Third-Party Defendant, Great West Casualty Company ("Great West"), the Michigan automobile no-fault insurer for the trucking company involved in the gas release, seeks a declaratory judgment and an award for breach of a no-fault auto insurance contract. In a prior Opinion and Order, the Court granted summary judgment for Great West and, therefore, dismissed Great West from the case. The second suit, against Third-Party Defendant, Travelers Property & Casualty Company ("Travelers"), seeks a declaratory judgment and an award for breach of a property insurance contract covering certain boilers and machinery. This matter is before the Court on Gulf's motion for partial summary judgment. At issue is whether Gulf's property insurance policy (the "Policy") covers the gas release.

Facts

A. The Incident

The parties do not dispute the material facts. Holland operates both the Holland Drinking Water Treatment Plant ("DWTP") and the Holland Waste Water Treatment Plant ("WWTP"). Holland contracted with the Alexander Chemical Corp. ("Alexander") to provide sodium hypochlorite (bleach) for the WWTP. Alexander contracted with Bulkmatic Transport to deliver the bleach to the WWTP.

Pursuant to that contract, John Johnson ("Johnson"), a Bulkmatic driver, picked up a shipment of bleach from Alexander in a tanker truck designed to transport chemical products. Johnson drove the bleach to the DWTP instead of the WWTP. Shortly after arriving at the DWTP, an employee of the DWTP, Dave Broene ("Broene"), allowed Johnson through the gate of the DWTP, took Johnson's bill of lading, and gave Johnson unloading instructions for

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the chemicals. The bill of lading stated that the chemical delivered was bleach and that the delivery was to be made to the WWTP.

The pipe Broene instructed Johnson to unload the bleach into was labeled "ALUM." Johnson testified that he checked with Broene multiple times and that each time Broene confirmed the pipe labeled "ALUM" was the correct pipe. Broene then supplied Johnson with an air supply required to move the bleach from the tanker into Holland's storage tank, and Johnson began transferring the bleach from the tanker into the storage tank.

The tank into which Johnson put the bleach contained Aluminum Sulfate ("Alum"). When the bleach from the tanker mixed with the Alum in the tank, chlorine gas was created and released into the air. Several individuals working at the DWTP noticed the gas and complained. Upon hearing the complaints, Broene instructed Johnson to stop unloading the bleach. Approximately 600 gallons of bleach were unloaded into the Alum tank.

*2 The release of the chlorine gas resulted in several people being treated at local hospitals, the evacuation of the DWTP facilities, damage to electrical equipment in the DWTP facilities, and Holland incurring cleanup and other related expenses.

Holland presented its insurer, Gulf, with a claim for property damage caused by the accident. Gulf denied the claim.

B. The Insurance Policy

The Policy was effective from July 1, 1998, until July 1, 1999. The Policy contains numerous coverages, but for purposes of this motion the relevant coverages are: the Public Entity Building and Personal Property Coverage ("Public Entity Coverage"); and the Contractor's Equipment Coverage ("Equipment Coverage"). [FN1]

> FN1. Gulf's Motion for Summary Judgment raised summary judgment arguments with respect to several other coverages. Gulf, however, withdrew its Motion for Summary Judgment with respect to all arguments except those relating to the two listed coverages. (*See* Pl.'s Mot. to File Br. (docket no. 59)). Gulf further restricted its argument to the application of the Pollution Exclusion to each of the coverages. The Pollution Exclusion, which is identical in the two coverages except for an immaterial phrase, is the only exclusion the Court will consider.

The Policy, under both the Public Entity Coverage and the Equipment Coverage, covers "direct physical loss" to "Covered Property," as defined in each coverage, unless the cause of the loss is among the exclusions defined in each coverage. (*See* Policy at Form C24729a, § A (hereinafter "Public Entity Coverage Form") and Form MA10173, § A (hereinafter "Equipment Coverage Form"), Pl.'s Br. Supp. Mot. Summ. J. Ex. A.). The sole exclusions at issue are the "Pollution Exclusion" to each coverage.

1. Covered Property

"Covered Property" under the Public Entity Coverage is defined as buildings, including: fixtures, permanently installed machinery and equipment, personal property owned by Holland and used to maintain or service the buildings, business personal property located in the buildings or within 100 feet of the premises, and the personal property of others that is in Holland's care and located in the buildings or within 100 feet of the premises. (*See* Public Entity Coverage Form at § A.1.). The Public Entity Coverage excludes from "Covered Property," among other things: animals, certain building foundations, underground pipes, and land, including the land on which covered buildings are located. (*See id.* at § A .2.) The Public Entity Coverage, therefore, covers the buildings and structures at the DWTP and certain personal property in or near the buildings, but does not extend to any land owned either by Holland or by a third party.

"Covered Property" pursuant to the Equipment Coverage includes Holland's "property" and "[s]imilar property of others for which [Holland] may be liable." (Equipment Coverage Form at § A.1.). Certain property is excluded from coverage, including: vehicles, property located underground, property "intended to become a permanent part of any structure," and land, including the land on which any property is located. (*See id.* at § A.2.)

2. Pollution Exclusion

Under the Pollution Exclusions, which are identical excepting an immaterial phrase, losses are not covered when the losses are caused by or result from "[d]ischarge, dispersal, seepage, migration, release or escape of 'pollutants'...." (Public Entity Coverage Form at § B.2.1.; Equipment Coverage Form, at § B.2.h.). A loss that otherwise falls within the

exclusions, however, is exempted from the Pollution Exclusions and will be covered by the Policy if "the discharge, dispersal, seepage, migration, release or escape" is itself caused by any of the specified causes of loss. (*Id.*)

Standard

*3 Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56. The rule requires that the disputed facts be material. Material facts are facts which are defined by substantive law and are necessary to apply the law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). A dispute over trivial facts which are not necessary in order to apply the substantive law does not prevent the granting of a motion for summary judgment. *See id.* at 248, 106 S.Ct. at 2510. The rule also requires the dispute to be genuine. A dispute is genuine if a reasonable jury could return judgment for the non-moving party. *See id.* This standard requires the non-moving party to present more than a scintilla of evidence to defeat the motion. *See id.* at 251, 106 S.Ct. at 2511 (citing *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867 (1872)). The summary judgment standard mirrors the standard for a directed verdict. *See id.* at 250, 106 S.Ct. at 2511. The only difference between the two is procedural. *See id.* Summary judgment is made based on documentary evidence before trial, and directed verdict is made based on evidence submitted at trial. *See id.*

A moving party who does not have the burden of proof at trial may properly support a motion for summary judgment by showing the court that there is no evidence to support the non-moving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25, 106 S.Ct. 2548, 2553-54 (1986). If the motion is so supported, the party opposing the motion must then demonstrate with "concrete evidence" that there is a genuine issue of material fact for trial. *Id.*; *see also Frank v. D'Ambrosi*, 4 F.3d 1378, 1384 (6th Cir.1993). The court must draw all inferences in a light most favorable to the non-moving party, but may grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir.1992)(quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986)).

Discussion

The parties agree on the relevant facts. Holland alleges direct physical damage to buildings, systems, and equipment resulting from the chlorine gas leak. Gulf does not challenge that the damaged property is "Covered Property" under either the Public Entity Coverage or the Equipment Coverage of the Policy. Therefore, the Court must determine whether the Pollution Exclusions bar Holland's recovery under the Coverages. [FN2]

> FN2. Because the Pollution Exclusions in the two contested coverages are substantively identical, the Court will consider them together as one exclusion which excludes Holland's claims under both Coverages, or neither Coverage. Therefore, from this point, the Pollution Exclusions will be referred to in the singular.

The Policy must be construed according to Michigan law. In construing questions of Michigan law, this Court applies the law in accordance with the decisions of the Michigan Supreme Court. *See Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178, 1181 (6th Cir.1999). Where the Michigan Supreme Court has not addressed an issue, a Michigan appellate court decision on the issue binds this Court "absent a strong showing that the [Michigan Supreme Court] would decide the issue differently." *See Kurczi v. Eli Lily & Co.*, 113 F.3d 1426, 1429 (6th Cir.1997)(quoting *Garrett v. Akron-Cleveland Auto Rental, Inc. (In re Akron-Cleveland Auto Rental, Inc.)*, 921 F.2d 659, 662 (6th Cir.1990)). While an appellate court decision lacks the controlling force of the Michigan Supreme Court, the Sixth Circuit has held that " '[a federal court] should not reject a state rule because it was not announced by the [Michigan Supreme Court],' even if [the federal court] believe[s] that the rule is 'unsound.' " *See id.* (quoting *Ziebart Int'l Corp. v. CNA Ins. Cos.*, 78 F.3d 245, 250 (6th Cir.1996)).

*4 When interpreting insurance policies, the Michigan Supreme Court follows a number of well-established rules. First, any clause in a policy is valid as long as it is clear, unambiguous, and does not contravene public policy. The Court cannot create ambiguity where none exists. *See Fire Ins. Exch. v. Diehl*, 450 Mich. 678, 687, 545 N.W.2d 602, 606 (1996). Second, exclusionary clauses are strictly construed in favor of the insured. *See id.* Coverage, however, is lost where an unambiguous exclusion within the policy applies to an insured's claims. *See id.*

The parties agree that chlorine is a "pollutant" within the definition of the Policy. The issues, therefore, are whether the Pollution Exclusion is limited to traditional environmental pollution or extends to cases of pollution in confined, localized areas, and, if the accident otherwise falls within the Pollution Exclusion, whether the discharge of chlorine gas was caused by a specified cause of loss. The Court will consider each of these issues separately.

A. Scope of the Pollution Exclusion

Gulf argues that the plain language of the Pollution Exclusion bars coverage of Holland's loss because the loss was the result of a release of chlorine gas, a pollutant. Holland counters that courts have construed Pollution Exclusions, despite their broad wording, to refer only to traditional incidents of environmental pollution that happen gradually over time, not to accidental leaks.

The Michigan Supreme Court does not appear to have addressed the scope of these exclusions, known as absolute pollution exclusions. The Michigan Court of Appeals, however, has addressed the issue. In *McGuirk Sand & Gravel Inc. v. Meridian Mutual Insurance Co.*, 220 Mich.App. 347, 559 N.W.2d 93 (1996), the court, considering an absolute pollution exclusion, held:

> The vast majority of courts asked to interpret absolute pollution exclusions have concluded that the exclusions are unambiguous and operate to exclude coverage for all claims alleging damage caused by pollution. There is a definite national trend to construe such exclusions as clearly and unambiguously precluding coverage for claims arising from pollution. Most courts that have examined similar exclusions have concluded that they are clear and unambiguous and are just what they purport to be - absolute.
>
> Although there is no appellate authority in Michigan interpreting an absolute pollution exclusion, we agree with the above authorities that the absolute exclusion in this case is clear and ambiguous.

Id. at 354, 559 N.W.2d at 96-97 (citations omitted). While the Michigan Supreme Court has not decided the issue, this result appears to follow Michigan's insurance policy interpretation principle of not creating ambiguity where none exists.

Holland cites *Meridian Mutual Insurance Co. v. Kellman*, 197 F.3d 1178 (6th Cir.1999), in defense of the argument that absolute pollution exclusions are not complete bars to recovery for damages stemming from pollution. *See id.* at 1183. In *Kellman*, the Sixth Circuit explicitly noted the split in authority in interpreting absolute pollution exclusions but said, "[n]o Michigan state court appears to have addressed the issue." *See id.* at 1183. *Kellman* considered a situation in which damage resulted from fumes generated when a floor sealer, the "pollutant," was used to seal a floor, its intended purpose. The sole issue before the *Kellman* court was:

> ***5** whether the movement of fumes from a toxic chemical used to seal a floor in the course of an insured's business constitutes "discharge, dispersal, seepage, migration, release or escape" within the terms of an insurance policy's total pollution exclusion, when those fumes injure an employee of the institution for which the sealant is being applied, while that employee is working in a room on the floor immediately below the area where the sealer is being applied.

Id. at 1181. The Sixth Circuit said that it was not deciding whether an absolute pollution exclusion barred coverage where chemical fumes migrated over a distance. *See id.* at 1184. After citing cases from several jurisdictions giving a narrow interpretation to the absolute pollution exclusion, the court quoted the following from *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043-44 (7th Cir.1992):

> The bond that links these cases is plain. All involve injuries resulting from everyday activities gone slightly, but not surprisingly, awry. There is nothing that unusual about paint peeling off of a wall, asbestos particles escaping during the installation or removal of insulation, or paint drifting off the mark during a spray painting job. A reasonable policyholder, these courts apparently believed, would not characterize such routine incidents as pollution.

See Kellman, 197 F.3d at 1181-82. *Kellman* also recognized that other courts have held that a pollution exclusion "bars coverage for all injuries caused by the release of contaminants, even where the contaminant is dispersed into a confined or indoor area." *Id.* at 1182. *Kellman* concluded that there was no "discharge, dispersal, seepage, migration, release or escape" because the exclusion did not:

> unambiguously exclude[ ] coverage for injuries suffered by an employee who was legitimately in the immediate vicinity of the chemicals, and where the injury occurred only a few feet from where the chemicals were being used.... [T]he policy is ambiguous as to whether it covered injuries caused by toxic chemicals in the immediate area of their intended use.

Id. at 1183.

Unlike *Kellman,* the case at bar does not involve a "routine incident" as contemplated by *Kellman,* nor does it involve injuries or damage to nearby people or property a few feet from where the chemicals were being used according to their intended purpose. Rather, the chlorine gas was created and released or discharged unexpectedly from the Alum tank because bleach was mistakenly placed into that tank, and then the chlorine gas escaped some distance causing damage to the insured's property. The release or escape in the instant case is more like a traditional release of pollution into the air -i.e. similar to a spill into soil. Under these circumstances, the Court finds the absolute pollution exclusion applies unless the release or discharge was caused by a specified cause of loss.

***6** In addition, this Court finds inexplicable the Sixth Circuit's failure to discuss *McGuirk Sand.* The *McGuirk Sand* court's conclusion that pollution exclusions are absolute was based on the plain language of the exclusions and the drafting history of pollution exclusions generally in the insurance industry. *See* id. at 353-54, 559 N.W.2d at 96-97. This interpretation of pollution exclusions, based on the plain language of the exclusions and their drafting history, comports, as the Sixth Circuit recognized, with courts in other states which find pollution exclusions absolute. *See National Elec. Mfr. Ass'n v. Gulf Underwriters Ins. Co.*, 162 F.3d 821, 825-26 (4th Cir.1998)(applying District of Columbia law); *Haman, Inc. v. St. Paul Fire & Marine Ins. Co.*, 18 F.Supp.2d 1306, 1308-09 (N.D.Ala.1998)(mem.op.)(applying Alabama law); *Brown v. American Motorists Ins. Co.*, 930 F.Supp. 207, 208-09 (E.D.Pa.1996)(mem.op.)(applying Pennsylvania law); *American States Ins. Co. v. F.H.S., Inc.*, 843 F.Supp. 187, 190 (S.D.Miss.1994)(mem.op.)(applying Mississippi law); *Townsends of Ark., Inc. v. Millers Mut. Ins. Co.*, 823 F.Supp. 233, 238 (D.Del.1993)(applying Arkansas law), *aff'd,* 26 F.3d 123 (3d Cir.1994); *Ducote v. Koch Pipeline Co.*, 730 So.2d 432, 436-37 (La.1999); *Deni Assoc. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1138-39 (Fla.1998). There is no showing that the Michigan Supreme Court would decide the issue differently. In fact, the Court believes that the Michigan Supreme Court would decide the issue the same as *McGuirk.* Therefore, this Court is bound by the *McGuirk Sand* court's holding on the issue. *See Kurczi,* 113 F.3d at 1429; *Dinsmore Instrument Co. v. Bombardier, Inc.*, 199 F.3d 318, 320 (6th Cir.1999).

As a result, the Court finds that the Pollution Exclusion acts to bar Holland's claims, unless the discharge of chlorine gas was "itself caused by any of the specified causes of loss."

B. Cause of the Chlorine Gas Discharge

Holland argues that even if the Pollution Exclusion *prima facie* bars recovery, Holland's claims fall within an exception to that exclusion because the release of chlorine gas was caused by a specified cause of loss, that is, by a vehicle. Holland argues that the reaction creating the chlorine gas was a direct result of the unloading of the tanker truck.

There are, however, two flaws in Holland's reasoning. First, while the creation and release of the chlorine gas would not have occurred but for the unloading of the tanker truck, the actual cause of the chlorine gas release was the human error in unloading the bleach into the Alum tank. Had the tanker truck loaded the bleach into a bleach tank, no chlorine gas would have been created. *See Robert E. Lee & Assoc., Inc. v. Peters,* 206 Wis.2d 509, 518-19, 557 N.W.2d 457, 461 (Wis.Ct.App.1996). Second, Michigan courts do not generally consider the unloading of a vehicle to constitute use of the vehicle. *See Ford Motor Co. v. Insurance Co. of N. Am.*, 157 Mich.App. 692, 697, 403 N.W.2d 200, 202 (1987)(per curiam)(holding that no Michigan court has interpreted "use" as a motor vehicle to include unloading of a motor vehicle).

***7** The fact that the bleach was unloaded from the tanker truck into the Alum tank, therefore, does not make the vehicle the cause of the loss. The tanker truck was not being used as a vehicle when the accident occurred, and the actual cause of the accident was human error, not the tanker truck.

Conclusion

For the foregoing reasons, the Court will grant Gulf's motion for summary judgment based on the grounds that the Pollution Exclusion excludes coverage.

An Order consistent with this Opinion will be entered.

ORDER

Plaintiff, Gulf Insurance Company ("Gulf"), filed this action against Defendant, City of Holland ("Holland"), seeking a declaratory judgment that Gulf

was not liable for Holland's insurance claims for property damage and related expenses stemming from a gas release. Holland counter-claimed for its insurance claims and filed two third-party lawsuits. The first suit, against Third-Party Defendant, Great West Casualty Company ("Great West"), the Michigan automobile no-fault insurer for the trucking company involved in the gas release, seeks a declaratory judgment and an award for breach of a no-fault auto insurance contract. In a prior Opinion and Order, the Court granted summary judgment for Great West and, therefore, dismissed Great West from the case. The second suit, against Third-Party Defendant, Travelers Property & Casualty Company ("Travelers"), seeks a declaratory judgment and an award for breach of property insurance contracts covering certain boilers and machinery. This matter is before the Court on Travelers' motion for summary judgment. At issue is whether Travelers' insurance policies, the Boiler and Machinery Policy, and the Builder's Risk Policy, cover the gas release.

In its response brief, Holland concedes that the Boiler and Machinery Policy does not cover Holland's loss. As a result, the Court will dismiss Holland's claims against Travelers with respect to the Boiler and Machinery Policy.

In an Opinion and an Order, both dated April 3, 2000, this Court granted Gulf's motion for partial summary judgment, holding that an absolute pollution exclusion in Gulf's insurance policy barred certain of Holland's claims. The facts and the absolute pollution exclusion at issue in Travelers' motion for summary judgment with respect to the Builder's Risk Policy are identical to those considered by the Court in its April 3, 2000, Opinion. The Court, therefore, adopts the facts and reasoning set forth in that Opinion. For that reason,

IT IS HEREBY ORDERED that Travelers Property & Casualty Co.'s Motion for Summary Judgment (docket no. 48) is GRANTED. Based on the Pollution Exclusion, Defendant's claims are not covered by Plaintiff's insurance policy.

IT IS FURTHER ORDERED that Third Party Defendant Travelers Property & Casualty Co. is DISMISSED.

2000 WL 33679413 (W.D.Mich.)

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

VILLAGE OF NASHVILLE, Township of Castleton, and Township of Maple Grove, Plaintiffs-Appellees,
v.
MICHIGAN TOWNSHIP PARTICIPATING PLAN, Defendant-Appellant.

No. 224598.

Aug. 3, 2001.

Before: NEFF, P.J., and DOCTOROFF and WILDER, JJ.

PER CURIAM.

*1 In this declaratory judgment action involving an insurer's duty to defend, defendant appeals as of right from an order denying defendant's motion for summary disposition, granting plaintiffs' cross-motion for summary disposition, and awarding plaintiffs their costs in defending against a PCB (polychlorinated biphenyl) contamination lawsuit. We reverse.

I

Plaintiffs jointly operated a transfer station for waste products, which accepted the delivery of four drums of waste oil, subsequently transferred to an oil recycling plant. In 1993, the operator of the recycling plant commenced litigation against plaintiffs in federal court, seeking damages for the contamination of 200,000 gallons of fuel, alleging that the barrels of oil delivered from plaintiffs' transfer station were contaminated with PCB and were the source of contamination of the fuel. Defendant insurer refused to defend plaintiffs in the federal litigation on the basis that the claims would not be covered by plaintiffs' insurance because of a pollution exclusion in the policy and therefore defendant had no duty to defend.

Plaintiffs filed the instant action to recover litigation costs. The parties filed cross-motions for summary disposition. The court granted plaintiffs' motion and denied defendant's motion, awarding plaintiffs stipulated damages of $276,947, plus prejudgment statutory interest of $32,504.85 and penalty interest of $142,886.30.

II

This Court reviews de novo a motion for summary disposition. *Baker v. Arbor Drugs*, 215 Mich.App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Id.* This Court must review the record evidence and all reasonable inferences drawn from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial. *Id.*

III

An insurer has a duty to defend its insured if the allegations of the underlying suit arguably fall within the coverage of the policy. *Radenbaugh v Farm Bureau General Ins Co of Michigan*, 240 Mich.App 134, 137; 610 NW2d 272 (2000). In determining whether a duty to defend the insured is imposed, this Court must look behind the third party's allegations to analyze whether coverage is possible. *Id.* at 137-138; *McGuirk Sand & Gravel, Inc v. Meridian Mut Ins Co*, 220 Mich.App 347, 357; 559 NW2d 93 (1996). A duty to defend exists if there are any theories of liability that arguably fall within the policy, despite the assertion of other theories that are not covered under the policy. *Radenbaugh, supra* at 137.

Defendant contends that no duty to defend existed because the claims against plaintiffs fall either under the policy's pollution exclusion to general liability coverage or under the pollution claim exclusion to the policy's errors and omissions endorsement. We agree. Plaintiffs' policy includes a pollution exclusion under the comprehensive general liability insurance coverage, which provides:

*2 This policy does not apply to:
(1) "Personal Injury" or "Property Damage" arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants:
(a) at or from premises owned, rented or occupied

EXHIBIT 7

act, error or omission," no coverage was possible where plaintiffs actions were alleged to have caused the PCB contamination of the recycled oil. Thus, no duty to defend arose concerning the federal litigation.

IV

Plaintiffs further allege that regardless of the construction of the pollution exclusion, defendant had a duty to defend because plaintiffs had reasonable expectations of coverage. We disagree.

Under the reasonable expectations rule, courts consider whether the policyholder, upon reading the contract language, is led to a reasonable expectation of coverage. *Farm Bureau Mutual Ins Co v. Nikkel*, 460 Mich. 558, 568-569; 596 NW2d 915 (1999). Factors involved in determining whether a policyholder had a reasonable expectation of coverage include:

> " 'whether an insurance policy includes a provision that unambiguously limits or excludes coverage and ... whether a policy holder could have sufficiently examined an insurance policy so as to discover a relevant clause which limits the coverage ....' " [*Id.* (citations omitted).]

*4 There is no ambiguity in the absolute pollution exclusion, and plaintiffs could have discovered the clause upon examination of the contract. Thus, plaintiffs did not justifiably have a reasonable expectation of coverage.

V

In light of our finding that defendant had no duty to defend and therefore plaintiffs were not entitled to judgment in their favor, we need not address the issues of statutory and penalty interest.

Reversed and remanded for entry of an order denying summary disposition for plaintiffs and granting summary disposition for defendant. We do not retain jurisdiction.

2001 WL 879007 (Mich.App.)

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STATE OF MICHIGAN

IN THE SUPREME COURT

CITY OF GROSSE POINTE PARK,
MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

S.C. No.: 125630

C.A. No.: 228347

vs.

L.C. No.: 98-806998-CK

MICHIGAN MUNICIPAL LIABILITY
AND PROPERTY POOL,

Defendant-Appellant/Cross-Appellee.

ETHERIDGE CASE CHRONOLOGY TO THE MICHIGAN MUNICIPAL LIABILITY AND PROPERTY POOL'S BRIEF ON APPEAL

DATE	EVENT AND RELEVANT TESTIMONY
9/14/95	Suit is filed. **(Apx 787a)**
10/6/95	The defense of Grosse Pointe Park ("Park") is assumed by the Pool under a Reservation of Rights letter informing the Park that some or all of the claims made may not have indemnification coverage and informing the Park of its right to hire its own attorney in the case. **(Apx 801a)**
12/8/95	Plaintiff's Motion for Certification of Class Action is granted. **(Apx 804a)**
12/11/96	Park files Motion to Compel Discovery, noting that it has yet to receive any response to previous discovery submitted to plaintiffs and Detroit **(Apx 821a)**
1/3/96	Defense counsel meets with two Park attorneys (Deason and Carnaby) to discuss strategy and Deason and Carnaby agree to be in close contact with defense counsel in defense of the suit. **(Apx 806a, Deason, 118, Apx 555a)**
1/96	Defense counsel's conflict of interest is identified. The Pool retains a new defense counsel and firm, John McSorley of Garan, Lucow, Miller Seward & Becker ("Garan Lucow") who files his Appearance on 1/24/96. **(Apx 787a, and 808a)**

1/11/96 Herold Deason, the Park's City Attorney, meets with the adjustor and Pool Administrator, M. Forster, seeking withdrawal of the Reservation of Rights letter. The Pool refuses. **(Apx 808a)**

Relevant Testimony

Deason testified that, upon receipt of the reservation of rights letter, he called the Pool's adjustor. He told the adjustor he **"disagreed with the reservation of rights and the conclusion that there might not be coverage."** A meeting was arranged with the Pool administrator. Deason recalls **"probably"** asking that the letter be **"withdrawn"** and being told **"the letter stood."** Deason reported the result of this meeting to the Park's City Manager, Dale Krajniak. **(Deason, 101-106 and 118, Apx 555a - 552a, and 555a)**

1/29/96 Deason and a second Bodman Longley attorney (Carnaby) meet with McSorley to discuss strategy and defense of the Etheridge suit. **(Apx 811a)**

Relevant Testimony

Deason has testified the Park was aware that it had a right to hire its own attorney in Etheridge **(Deason, 98, Apx 550a – 551a)**. It determined it would not have its own attorneys file an Appearance in Etheridge. **(Deason, 98 & 100 Apx 550a and 551a)** Rather, the Park's attorneys, Deason in particular, were in direct and regular contact with McSorley throughout the case. Deason and other Bodman Longley attorneys received copies of critical correspondence, pleadings and notices. Deason testified Bodman Longley did **"work with Mr. McSorley"** and **"follow the work he was doing and discuss the case with him as counsel to the City from time to time."** He testified that Bodman Longley was **"given the opportunity to comment on and assist in the preparation of pleadings ... in Etheridge"** and to **"assist in and comment upon the discovery conducted by Mr. McSorley." (Deason, 96 and 98-99, Apx 550a, and 550a)**

McSorley testified nothing prevented the Park's own attorneys from filing an appearance in Etheridge. He testified he informed the **"Bodman"**firm **"what was going on in the case ... and asked and allowed for consultation and recommendations or participation ... in the litigation,"** and **"I was reporting to them and allowing and obtaining consultation and participation"** from **"Bodman"** in the case. **(McSorley, 61-62, Apx 563a)**

10/1/96 Amended Scheduling Order entered. Final date for class members to be excluded - 11/14/96, discovery cut-off - 4/1/97, dispositive motions filed - 5/1/97, motions heard by - 6/1/97, mediation - 7/97, trial - 9/1/97. Copy of Order to Park's attorneys. **(Apx 815a)**

11/22/96 Plaintiffs' Motion for Injunctive and Dispositive Relief is filed. Notice provided to Park's attorneys. **(Apx 787a and 817a)**

12/9/96 Plaintiffs' Witness List, identifying 380 class members, is filed. Copy to Park's attorneys. **(Apx 819a)**

12/20/96 Court orders the parties to submit written proposals to reduce the flow or provide some sanitation of the discharges and appear for a hearing thereon on 1/31/97. **(Apx 824a)**

1/10/97 Hearing on Park Motion to Compel Discovery results in court orders compelling class members to respond to interrogatories. Park's attorneys are informed. **(Apx 787a and 827a)**

2/12/97 Court enters Order Appointing Special Master to serve for the court. **(Apx 787a and 829a)**

2/10/97 Park City Council fails to adopt a mandatory disconnect ordinance. **(Apx 833a)**

2/24 & 2/26/97 Summaries of ten (10) individual plaintiffs' Answers to the Park's interrogatories are completed by defense counsel. Copies to the Park's attorneys. **(Apx 834a)**

3/18 & 3/27/97 Summaries of five (5) individual plaintiffs' Answers to Park interrogatories are completed by defense counsel. Copies to the Park's attorneys. **(Apx 834a)**

3/27/97 A draft of the Park's Amended Cross Complaint is submitted to the Park's attorney (Carnaby) for comment before filing. **(Apx 889a)**

3/31/97 Summaries of five (5) individual plaintiffs' Answers to Park interrogatories are completed by defense counsel. Copies to the Park's attorneys. **(Apx 834a)**

4/3/97 Park's Amended Cross Complaint against the City of Detroit is filed. Copy provided to Park's attorneys. **(Apx 787a and 891a)**

4/3 & 4/11/97 Summaries of six (6) individual plaintiffs' Answers to Park interrogatories are completed by defense counsel. Copies to the Park's attorneys. **(Apx 834a)**

4/30/97 McSorley completes comprehensive review and analysis of historical documents. Copy provided to the Park's attorneys with case and strategy update. **(Apx 893a)**

5/22/97 Order Regarding Interim Protection entered. **(Apx 787a and 895a)**

6/23 - 6/2/97 Summaries of twelve (12) individual plaintiffs' Answers to Park interrogatories are completed by defense counsel, with copies to the Park's attorneys. **(Apx 834a)**

7/7/97 All counsel and the Park's attorneys are informed that dispositive motions are now set for hearing on 7/30/97. **(Apx 787a and 899a)**

7/17/97 Plaintiffs' Settlement Demand of $15.8M with supporting documentation is submitted to the Park and Detroit and a copy is provided to the Park's attorneys. **(Apx 900a)**

7/21/97 Summaries of two individual plaintiffs' Answers to Park interrogatories are completed by defense counsel, with copies to the Park's attorneys. **(Apx 834a)**

7/97 McSorley and the Park's City Attorney, Deason, meet with Detroit's defense counsel and Detroit's corporation counsel to confirm Detroit's agreement to participate in a settlement payment to the plaintiffs on a 50/50 basis. **(Deason, 46 and McSorley 51-52, Apx 561a and 562a)**

Relevant Testimony

Deason testified he attended a meeting with McSorley and Detroit Corporation counsel, Phyllis James. Deason and James attended **"as corporation counsel for each of the respective cities."** They discussed a 50/50 split of an Etheridge settlement and Ms. James and Mr. Deason **"agreed to recommend that splitting to our respective governing bodies." (Deason, 116, Apx 555a)**

McSorley's testimony verifies this meeting and Deason's participation on behalf of the Park. **(McSorley, 152, Apx 562a)**

7/24/97 Meeting at the offices of Bodman, Longley and Dahling, attended by defense counsel, adjustor, Park's Mayor, City Attorneys, and City Manager. Detroit has agreed to pay one-half of $1.5M. Adjustor states she will seek authority for one-half ($750,000) from the Pool's Board of Directors. **(Krajniak, 179-180 & 181, Apx 469a – 470a; Deason, 120, Apx 556a)**

Relevant Testimony

As to his awareness of the reservation of rights letter ,at this point in time, City Manager, Dale Krajniak, does not recall that it was **"mentioned routinely at every meeting"** he does recall **"on occasion, whether it was John McSorley, myself and/or Pam (the adjustor) discussed that there was still no conclusion relative to the Pool's position on coverage. That we were still waiting, particularly before this meeting it was still an open issue." (Krajniak, 185, Apx 471a)**

Deason was specifically asked whether he was misled by the adjustor's statements at this 7/24/97 meeting. His response was that the adjustor's failure to raise coverage at this point **"could"** have led him **"to believe that the Pool was not relying on its reservation of rights letter."** he testified, **"I don't know that I formed a specific conclusion at that time." (Deason, 120-121, Apx 556a)**

Krajniak testified that, at this meeting, the adjustor did no more than indicate that she felt **"comfortable"** recommending $750,000 to the Board. **(Krajniak, 181 and 194-195, Apx 470a and 473a)** He was asked: **"That's different from the Pool agreeing to pay one-half of the settlement, isn't it?"** Answer: **"Yes." (Krajniak, 194-195, Apx 473a)**

8/1/97 McSorley writes to the adjustor stating he will proceed to the first facilitation session "under circumstances wherein no formal settlement authority has been authorized" by the Pool and acknowledges that "any and all settlement discussions before the facilitator are subject to final approval and appropriation of funds by the Michigan Municipal League, the City of Detroit and Grosse Pointe Park" and that "all settlement discussions will contain the caveat that same are a recommendation of counsel" and "should not be considered formal discussions and/or offers of settlement." **(Apx 905a)**

Relevant Testimony

McSorley has testified that this letter does "accurately reflect" his "authority" as he entered the settlement facilitation process. That he had no "authority for dollars" at the first facilitation on 8/10/97, and that the facilitator and all attorneys were aware of this, and all "settlement discussions would be considered recommendations of counsel only and should not be considered formal discussions and/or offers of settlement." **(McSorley, 33 Apx 558a)**

City Manager, Krajniak has testified that, after the 7/24/97 meeting, he does not recall any discussions with the adjustor as to when the Pool's Board would next meet. **(Krajniak, 187 Apx 471a)**

8/10/97 Facilitation session No. 1. All parties and counsel are present. The Park is represented by City Manager, Dale Krajniak. Prior to this session the adjustor reminded Mr. Krajniak that indemnification coverage remains an issue and that a meeting between the Pool and Park will be arranged, including the Pool's outside coverage counsel. **(Apx 912a)**

8/11/97 Claims adjustor confirms, in writing, a meeting between the Pool, the Pool's coverage counsel, and Grosse Pointe Park's City Manager and City Attorney to be held on 8/27/97. **(Apx 916a)**

Relevant Testimony

City Manager, Krajniak testified that he went to the 8/10/97 facilitation session without asking the adjustor what the Pool's position was relative to the $750,000 settlement discussed on 7/24/97. He knew the Pool's position was not **"determined at that point"** that **"it was not finalized." (Krajniak, 188, Apx 472a)**

Krajniak does not deny that he was reminded on 8/10/97 of the coverage issue. He said only that he does **"not recall"** discussing the reservation of rights letter with the adjustor on that date. **(Krajniak, 148 and 151, Apx 466a)**

Regarding the upcoming (8/27/97) meeting arranged by the adjustor, Krajniak does not recall receiving a letter confirming the meeting (**Apx 916a**) but he has no reason to believe he did not receive the letter. **(Krajniak, 153, Apx 467a)**

Krajniak did not expect full indemnity coverage when he went to the first facilitation session on 8/10/97. His response was **"my sense was that the majority of the settlement amount that was being discussed would have been borne by the Pool." (Krajniak, 171, Apx 469a)**

8/26/97 Facilitation session No. 2. Grosse Pointe Park is represented by City Manager, Dale Krajniak. This session results in an agreement between counsel to recommend a settlement payment of $3.8M to be equally split between Park and Detroit. (**Apx 917a**)

Relevant Testimony

City Manager, Krajniak has offered a significant amount of testimony as to his state of mind on coverage both before and after this second facilitation session. He has testified that: **"There was a meeting established for the next day and there was a reservation of rights letter that was outstanding since October, '95. So yes, I was aware that there was going to be a meeting to discuss settlement coverage, so forth." (Krajniak, 192, Apx 473a)**

His understanding of the purpose of the meeting on 8/27 was: **"It was going to be for both myself and Mr. Deason to receive input relative to the Michigan Municipal League and the degree that they felt they would cover or not cover the settlement for the Etheridge case." (Krajniak, 154, Apx 476a)**

Deason testified that the settlement discussed on 8/26 was not a **"binding settlement with the plaintiff ..."** and that on 8/27, it was his understanding that the plaintiffs and Detroit were also free at that time to **"withdraw from the informal settlement that had been discussed"** on 8/26/97. **(Deason, 111-112, Apx 553a – 554a)**

McSorley has testified the settlement of $3.8M discussed on 8/26/97 was not **"binding"** on the Park, the City of Detroit, or the plaintiffs and all parties to Etheridge were then free to proceed to **"further negotiations and counter offers"** or **"motions for summary disposition and a possible trial." (McSorley, 38, Apx 559a)**

8/27/97 Pool representatives and Pool coverage counsel meet with Park's City Manager and City Attorney. They are informed that the Pool does not believe the coverage document provides indemnification coverage in Etheridge. Grosse Pointe Park's response to this position is sought. **(Krajniak, 156 and 189, Apx 468a & 472a; Deason, 108-111, Apx 553a)**

Relevant Testimony

Deason testified he was in Europe when this meeting (8/27/97) was scheduled and he was contacted by telephone in Europe by the City Manager to confirm that he (Deason) **"would be available for the meeting." (Deason, 108, Apx 553a)**

Deason arrived from Europe a day or two before this meeting. He described the purpose of the meeting to be a discussion of **"the settlement or proposed settlement of the Etheridge lawsuit ... it's possible that, although I can't specifically state, that the issue of coverage or partial coverage was also placed on the agenda." (Deason, 109, Apx 553a)**

Deason recalls that, at this meeting, the Park was told **"the Pool's position was that there was no coverage"** and it was agreed the Pool's counsel would send a letter on the issue and the Park would have the opportunity to respond. **(Deason, 110-111, Apx553a)**

9/97 McSorley is informed that coverage is unresolved and he seeks directions from the Park as to whether he is to proceed with settlement negotiations.

Relevant Testimony

McSorley testified that, after the coverage issue was brought to his attention, the Park "instructed" him to continue forward with the facilitation and the negotiations, including the $3.8M monetary portion of the settlement. He was told by the Park to **"continue with the negotiations in all aspects, right, the monetary as well, and $3.8M was a figure discussed at that point and continued under discussions as we moved through the facilitations." (McSorley, 44-45, Apx 561a)**

Deason recalls that, after his 8/27/97 meeting with the Pool, **"he consulted with McSorley as to McSorley's authority to proceed forward in settlement discussions in the Ehteridge litigation."** Deason said that he **"had a number of discussions of issues with my client, the City, principally the City, with the City Manager and with Mr. McSorley regarding what the position of the exposure to the City would be. Were we to back out of the proposed settlement? And those resulted finally in a decision by the City that it was in the best interest of the City if there was no coverage to proceed with a settlement because we were where we were." (Deason, 121-122, Apx 556a)**

9/22/99 Facilitation session No. 3. The coverage issue is brought to the attention of the facilitator and all parties. Parties and counsel agree to begin preparation of settlement documents, with the understanding there are "outstanding collateral coverage issues" as well as "a pending decision of acceptance and agreement of the proposed settlement by the parties." **(Apx 920a)**

Relevant Testimony

McSorley testified that, at this session, the coverage dispute was brought to the facilitator's attention, who then met with the plaintiffs and their counsel to determine if the plaintiff wanted to continue settlement discussions knowing the Park's insurance coverage was in doubt. The plaintiff's decided to proceed. And, it was the position of the Park that, "if the plaintiff's wanted to continue with the facilitation process, Grosse Pointe Park wanted to continue with the facilitation process." **(McSorley, 41-44, Apx 560a)**

10/17/97 McSorley transmits drafts of settlement documents to plaintiffs' attorneys and confirms a schedule for continued work on final settlement documents. He reminds plaintiffs' counsel of the unresolved coverage issue; that he has no authority from his client, the Park, to agree to or enter into the proposed settlement, but will continue with the preparation of settlement documents. A copy of this letter is sent to the Park's attorneys. That same day, defense counsel writes to the claims adjustor confirming he has been instructed by both the Pool and Park to continue preparation of settlement documents calling for the Park's payment of $1.9M, with a copy of this letter sent to the Park's attorneys. **(Apx 921a)**

10/22/97 The Park City Council met in closed session to hear a report from defense counsel on the Etheridge settlement, including counsel's assessment that the $3.8M settlement is a "very reasonable resolution of the case" and should be accepted. **(Apx 926a)**

10/27/97 Facilitation No. 4 is held. **(Exhibit, Apx 921a)**

11/97 The Pool and Park commence negotiations on the coverage issue leading to agreement that the Pool will pay $1.9M for the Park and that amount will be paid back to the Pool with interest, in a set period of time. The agreement is finalized on or about 1/14/98. **(Apx 941a)**

12/16/97 McSorley writes to plaintiff's counsel to confirm the schedule to be followed by Detroit and Park City Councils for approval of the final settlement. **(Apx 928a)**

12/19/97 Final settlement documents are forwarded to the Park's City Manager by McSorley. **(Apx 930a)**

12/23/97 The Park's City Council met in special session with both McSorley and its own City Attorneys, Messrs. Deason and Hupp, to consider the proposed settlement. The settlement is approved contingent on receipt of information on the class members opting out of the settlement. Council passes a resolution approving acquisition of the settlement funds through a bond issue as opposed to financing through the Pool as had been arranged. **(Apx 932a)**

Relevant Testimony

Mayor Heenan testified that, at this time, the Park had the right to **"reject the settlement"** but he voted to approve it because it's **"a favorable settlement and the risk is too great to consider going to trial and possibly having to pay $7M"** and he considered Detroit's 50/50 sharing of the settlement to be **"particularly favorable to the City of Grosse Pointe Park at that time." (Heenan, 87-88, Apx 552a - 553a)**

Deason testified that, as the Park's own attorney, he recommended the settlement of $1.9M to City Council. **(Deason, 122-123, Apx 556a)**

Krajniak testified he believed this settlement to be a good settlement and that **"the settlement amount appears very reasonable." (Krajniak, 157, Apx 468a)**

McSorley, who appeared before City Council on 12/20/97, recommended the $1.9M settlement because **"in its total complexity, that was in the best interest of my client, the City of Grosse Pointe Park, that the matter be resolved"** in that manner. **(McSorley, 46, Apx 561a)**

1/12/98 The Park's City Council meets to vote to amend the terms and conditions of its original bond resolution. **(Apx 939a)**

1/22/98 The parties appear in court for entry of the Order Approving Settlement of Class Action and Park City Manager, Krajniak, signs the final settlement agreement, committing the Park to payment of $1.9M to the Etheridge plaintiffs. **(Apx 787a and 948a)**

2/17/98 The Park, through defense counsel, transmits to and plaintiffs acknowledge receipt of $1.9M in partial satisfaction of the settlement agreement. **(Apx 954a)**